91-157

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF LOS ANGELES,
Petitioner,

v.

RICHARD MEILICKE,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

DEWITT W. CLINTON
S. ROBERT AMBROSE
OWEN L. GALLAGHER
Office of the County Counsel
County of Los Angeles
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1891

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
JEFFREY S. STEINBERG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

January 14, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a local government may be liable under 42 U.S.C. § 1983 for a policy that is lawful in the ordinary course simply because the policy causes a violation of a federal statute in an exceptional circumstance not foreseen when the policy was adopted or enforced.

2. Whether the Ship Mortgage Act of 1920, which was enacted in order to provide security to mortgagees, confers upon mortgagors a federal right enforceable under 42 U.S.C. § 1983.

3. Whether the Ship Mortgage Act of 1920, which provides an exclusive federal forum for judicial foreclosure of preferred ship mortgages, preempts state enforcement of contractual provisions for non-judicial, self-help remedies.

LIST OF PARTIES

Anita Rexroat and Lee Baca were additional parties in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

The County of Los Angeles, through undersigned counsel, hereby petitions for a writ of certiorari to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division One.

OPINIONS BELOW

The opinion of the California Court of Appeal (App., *infra*, 1a-42a) is not officially reported.[1] The opinion of the Superior Court for Los Angeles County (App., *infra*, 43a-46a) is not reported.

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[1] The opinion of the Court of Appeal was initially reported in the advance sheets at 231 Cal. App.3d 1306, 282 Cal. Rptr. 893 (Cal. App. 1991). In accordance with the order of the California Supreme Court, this opinion will be withdrawn from the permanent editions of these reports. *See* Cal. R. Ct. Ann. 976 (Deering 1988).

JURISDICTION

The order of the Court of Appeal was entered on June 28, 1991. (App., *infra*, 1a-42a). The Supreme Court of California entered an order denying review on October 3, 1991. (App., *infra*, 47a). On December 11, 1991, Justice O'Connor extended the time for filing this petition for a writ of certiorari until January 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Civil Rights Act of 1871 provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983.

Section 30(K) of the Ship Mortgage Act of 1920, as amended at the time relevant to this case, provided, in relevant part, that:

> A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively.

46 U.S.C. § 951 (Repealed 1988).[2]

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[2] The Ship Mortgage Act was repealed in 1988, 102 Stat. 4752, and the substance of the relevant portion of Section 951 was re-

The Supremacy Clause of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

STATEMENT OF THE CASE

1. In October 1977, respondent Richard Meilicke was in possession of the 110-foot yacht Magnifico II, from which respondent operated a recording studio business. Around that time, respondent became involved in a dispute regarding ownership of the yacht with Nicolino and Franco Nicoletti. In an effort to avoid the Nicolettis' efforts to gain control of the yacht, respondent attempted to transfer title to his mother-in-law, Anita Rexroat. On October 20, Rexroat, as mortgagor, executed a preferred ship mortgage in favor of Nicolino Nicoletti, as mortgagee.[3] The mortgage included an express provision permitting Nicoletti to use self-help in repossessing the yacht in the event of default.[4] Although the California courts

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enacted without significant change and codified at 46 U.S.C. § 31325. For convenience, this petition will refer to the Ship Mortgage Act and its prior codification in the present tense.

[3] Under the Ship Mortgage Act of 1920, any mortgage on a United States vessel in favor of a United States citizen has preferred status, with a few exceptions immaterial here, upon satisfaction of certain endorsement and recordation requirements. 46 U.S.C. § 922. A preferred ship mortgage may be foreclosed by suit *in rem* in admiralty under specified procedures, and in such foreclosure suit it has priority over most other claims against the vessel. 46 U.S.C. §§ 951-954.

[4] Article XIII of the preferred ship mortgage provided in part: "In the event of default . . . Mortgagee may take possession of said vessel, its tackle, equipment, etc., without process of law, and

later determined that the mortgage was invalid because it had been obtained by coercion, respondent stipulated in this litigation that "the facts of [the mortgage's] invalidity were not apparent on the face of the document." California Superior Court Reporter's Transcript 53-54.

On the morning of November 10, 1977, the Nicolettis and their attorney went to the Marina del Rey substation of the Los Angeles County Sheriff's Department and spoke to Lieutenant Lee Baca. They showed Lieutenant Baca the mortgage and informed him that Rexroat had defaulted on the mortgage by failing to have the yacht insured. The Nicolettis and their attorney requested the assistance of the Sheriff's Department in exercising their right to self-help repossession. Baca examined the document and determined that on its face it entitled the Nicolettis to possession of the boat. He informed the Nicolettis, however, that because their dispute with respondent was civil in nature, the Sheriff's Department could not become involved other than to keep the peace. The Nicolettis then told Baca that they intended to place anyone who interfered with their repossession efforts under citizen's arrest. Under state law, the Sheriff's Department was required to make a citizen's arrest if so requested. Cal. Penal Code §§ 142 (Deering 1985), 847 (Deering 1983).

In an effort to avoid a confrontation, a Sheriff's Deputy contacted respondent, described the conversation with the Nicolettis, and explained Lieutenant Baca's interpretation of the mortgage and the possibility of a citizen's arrest.[5] Respondent then telephoned his attorney, who advised him to take the yacht to sea to avoid repossession.

Mortgagor shall forthwith surrender possession to Mortgagee who may sell the same at public or private sale after ten (10) days' notice to Mortgagor by mail."

[5] The Sheriff's Deputy initially spoke with a guard who was stationed on the Magnifico II. The guard then telephoned respondent, who came to the dock.

When the Nicolettis arrived at the dock, they saw respondent preparing to leave shore and protested that their yacht was being stolen. Respondent departed for the harbor. Acting under orders of Lieutenant Baca, the Harbor Patrol intercepted the yacht and, under threat of arrest, persuaded respondent to return to dock.

Following the yacht's return, Lieutenant Baca personally went to the dock in an effort to avert a violent confrontation. Respondent and the Nicolettis were engaged in a heated argument and each side requested Baca to arrest the other. Respondent refused voluntarily to leave the yacht so that the parties could discuss the dispute elsewhere, and Baca cautioned respondent that he was risking arrest for breach of peace. Respondent and his wife then peacefully accompanied Baca to the Sheriff's Department substation to discuss the matter with the Nicolettis. A Sheriff's Deputy remained behind to guard the yacht.

At the substation, the parties continued to argue about the yacht's ownership. Ultimately, it was decided that neither party would return to the yacht until the ownership dispute was resolved by the courts. In the meantime, a guard retained by the Nicolettis would remain on the yacht. In accordance with this resolution, the Sheriff's Deputy soon yielded custody of the boat to the Nicolettis' guard. The evidence was in dispute whether respondent fully and voluntarily agreed to this temporary resolution of the dispute.

2. Lieutenant Baca's response to the potentially violent altercation over the attempted repossession of the Magnifico II was consistent with existing County policy regarding the Sheriff's Department's role in attempted repossessions. Essentially, County policy was that the Department does not undertake to determine who is correct as a matter of law; instead, the Department's role is to keep the peace and to enforce the criminal law. In accordance with this policy, Lieutenant Baca declined to

make any binding determination regarding who was entitled to possession of the Magnifico II. Rather, Lieutenant Baca confined his efforts to enforcing interim measures so that a confrontation could be avoided while the dispute was being resolved in the courts.

A Sheriff's Department training guide in force at the time generally instructed that if a person in possession of property objects to repossession and asserts his right to a pre-repossession hearing, the repossessor cannot seize the property without a prior judicial determination. However, Department training also instructed officers that, as a matter of law, parties can waive their right to judicial process prior to repossession—*i.e.*, if the mortgagor has obtained a waiver, a "self-help" repossession may be permitted. The mortgage provision allowing self-help repossession in this case constituted such a waiver. Consistent with policy guidelines, Lieutenant Baca properly took respondent's facially valid waiver of his right to judicial process into account in his efforts to keep the peace. At the same time, Lieutenant Baca also followed Department policy by preserving respondent's right to an immediate judicial determination of the right of possession under the mortgage. The County did not have any policy or provide any training specifically relating to rights to repossession under preferred ship mortgages.

3. Immediately after November 10, 1977, respondent filed in state court a civil lawsuit against the Nicolettis and others seeking recovery of the yacht and damages. Respondent twice petitioned the state court for a preliminary injunction directing the Nicolettis immediately to return the boat, which the state court twice denied.[6] After three years of proceedings, the ship mortgage was held invalid as having been obtained through coercion, and in 1980 the state court entered judgment in favor of respondent and awarded him $3.76 million in damages.

[6] Respondent also unsuccessfully sought an order restricting the Nicolettis' use of the yacht.

The court also awarded respondent possession of the yacht, which by that time had deteriorated considerably due to lack of maintenance. Respondent later sold the yacht to a third party for $55,000 plus a release of other litigation valued at over $400,000.

Meanwhile, on October 30, 1978, respondent filed the present action against the County and Lieutenant Baca.[7] Respondent alleged, *inter alia*, that the County and Lieutenant Baca were liable under 42 U.S.C. § 1983 for violating his federal rights by aiding the Nicolettis' efforts to obtain possession of his yacht.[8] The court bifurcated the trial, and on June 28, 1984, following the jury's inability to agree on a liability verdict, the parties waived their right to a jury trial and submitted the case to the court, which promptly rendered an oral decision against the County. Judgment was entered in favor of the County's co-defendant, Baca, on grounds of good-faith immunity. Trial was then held on damages, and the court issued its final judgment as to both liability and damages on February 14, 1986. (App., *infra*, 43a-46a).[9]

As the basis for the County's liability, the court found that the Sheriff's Department had failed to train its officers or to adopt a policy with respect to enforcement of preferred ship mortgages. The court held that "this *lack of policy* led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights." (App., *infra*, 44a (emphasis added)). The court further stated that the County "knew, or should have known that such results could occur in the absence

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[7] Anita Rexroat was also a plaintiff in the trial court. During the appellate process, Rexroat assigned her entire interest to respondent and withdrew from the case.

[8] Respondent also alleged various state law claims, on which a non-suit was granted following presentation of respondent's case.

[9] The judgment as reproduced in the Appendix reflects an amendment to correct a clerical error that was entered on February 24, 1986.

of a definite and understandable policy." (*Id.*). The damages award at the time totaled almost $6.8 million; with post-judgment interest and "continuing lost profits" —which continue to this day—the County's liability under the award now exceeds $9 million.[10]

The County appealed the Superior Court's decision on both federal and state law grounds. On June 28, 1991, the Court of Appeal, in a lengthy opinion that was certified for publication, affirmed the judgment in all respects. (App., *infra*, 1a-42a). With regard to the federal issues raised by the County, the court held that the County's liability under Section 1983 rested upon its general policy of permitting self-help repossessions where the parties have waived their right to legal process. (App., *infra*, 15a-18a). The court held that, although "[t]he language of the Ship Mortgage Act is not . . . clear," that Act preempts the use of self-help provisions under state law under preferred ship mortgages. (App., *infra*, 18a-22a). Accordingly, the court concluded that "defendant's policy, which enabled Nicoletti to obtain immediate possession of the Magnifico over plaintiff's objection without having [Nicoletti] go through 'due process,' violated plaintiff's federal statutory rights" under the Ship Mortgage Act, and that the County therefore was liable under 42 U.S.C. § 1983. (App., *infra*, 23a).

The California Supreme Court denied the County's petition for discretionary review on October 3, 1991. At the same time, the court ordered that the Court of Appeal's decision not be officially published. (App., *infra*, 47a).[11]

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[10] The award consisted of: $3,000,000 for the value of the boat and equipment; $516,063 for lost personal property; $2,483,292 for lost profits; $42,529 for expenses in attempting to recover the boat; $750,000 for emotional distress and physical and mental suffering; $901.36 per day "continuing lost profits" from the date of judgment until paid; and 10% annual post-judgment interest. In addition, the court subsequently awarded respondent $300,000 in attorney's fees.

[11] The County has petitioned the Superior Court to reopen its judgment solely with respect to the question of the calculation of

REASONS FOR GRANTING THE PETITION

The Court of Appeal in this case upheld the judgment against the County because the County's policy of training its officers that a party may waive his right to judicial process prior to repossession—a policy that accurately and lawfully embodied existing legal standards—did not take into account the allegedly preemptive effect of the Ship Mortgage Act. Despite the fact that the County did not know and could not have known of this putative "preemptive" effect, the County's failure to train its officers regarding this purported narrow "exception" to existing law has rendered the County liable for an enormous award under Section 1983.

The decision below warrants review by this Court on three separate and important questions of federal law. First, the Court of Appeal's decision is inconsistent with this Court's decision in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), and the Ninth Circuit's decision in *Merritt* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989). The rule of Section 1983 municipal liability adopted by the court below exposes municipalities to extraordinary damages awards based upon failure to train police officers on myriad technical and shifting points of law. In effect, the rule announced below imposes strict liability if an agent of municipal government unwittingly violates an individual's statutory rights while implementing an ordinarily lawful municipal policy. Second, assuming *arguendo* that the Ship Mortgage Act has preemptive effect over contractual self-help provisions, the application of that Act to confer upon respondent rights enforceable under Section 1983 is in conflict with this Court's decision in *Golden State Transit Corp.* v. *City of Los*

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post-judgment interest. Because the federal questions decided by the Court of Appeal will survive and require decision regardless of the outcome of the petition to reopen, the Court of Appeal's decision is final within the meaning of 28 U.S.C. § 1257. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480-81 (1975).

Angeles, 493 U.S. 103 (1989). Finally, the Court of Appeal's interpretation of the Ship Mortgage Act to preempt state enforcement of contractual self-help provisions presents an important question of preemption doctrine, on which the state and federal courts are in conflict.

I. A MUNICIPALITY CANNOT BE LIABLE FOR NONFEASANCE UNDER SECTION 1983 ABSENT DELIBERATE INDIFFERENCE.

A. In *Monell* v. *Department of Social Servs.*, 436 U.S. 658 (1978), this Court held that a municipality cannot be held liable under Section 1983 based upon a theory of *respondeat superior*; instead, liability may be imposed on a municipal government only when "execution of a government's policy or custom" causes the deprivation of a federal right. *Monell*, 436 U.S. at 694. This limitation was derived from the language of Section 1983, which imposes liability only on persons who "subject, or cause to be subjected" any individual to a deprivation of federally protected rights. *Id.* at 691-94. *Monell* thus established "a fault-based analysis for imposing municipal liability." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 818 (1985) (plurality opinion); see also *id.* at 828 (Brennan, J., concurring) (Congress intended "to preclude municipal liability in cases in which the city itself was not at fault"); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 270 (1987) (O'Connor, J., dissenting) (plaintiff must show "that the city was at fault for establishing the policy").

Subsequent decisions of this Court have made substantial progress toward elaborating what constitutes a "policy or custom" for which a municipality can be held liable. See *Monell*, 436 U.S. at 694. In particular, the Court has made clear that a municipality's liability is limited to acts that the local government has "officially sanctioned or ordered." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986). Thus, a municipality is not liable merely because its policy leaves an officer with discretion to com-

mit a particular act. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988). Moreover, " 'municipal liability under § 1983 attaches where—and only where—*a deliberate choice* to follow a course of action is made from among various alternatives' " by municipal policymakers. *City of Canton* v. *Harris*, 489 U.S. 378, 389 (1989) (quoting *Pembaur*, 475 U.S. at 483-84 (plurality opinion)) (emphasis added). In other words, the requirement of a municipal policy or custom "implies a course of action consciously chosen from among various alternatives" by the defendant. *Tuttle*, 471 U.S. at 823 (plurality opinion).

In *City of Canton*, this Court addressed the circumstances under which a municipality may be held liable under Section 1983 for failing to train its employees in the execution of a lawful policy. The Court held that a municipality may be liable only when its failure to train "amounts to deliberate indifference to the rights of persons with whom [its agents] come into contact." *Canton*, 489 U.S. at 388. This standard reaffirmed the Court's prior decisions that a "policy" requires a "deliberate" or "conscious" choice. *Id.* at 389. Deliberate indifference may be established when the need for training is "so obvious" that policymakers "know to a moral certainty" that it is necessary, or when a past pattern of violations makes it "plainly obvious" that further training is needed. *Id.* at 390 & n.10. The Court emphasized, however, that the mere fact that further training could have prevented the violation will not support a finding of liability. *Id.* at 391.

B. In this case, the County adopted two affirmative policies that influenced its agents' actions. First, the County had a policy that the Sheriff's Department should intervene in civil disputes only to keep the peace, and should not take sides or attempt to determine the parties' rights. Clearly, this policy did not "officially sanction or order" any purported violation of respondent's statutory

right to "possession" of his yacht. Respondent has not claimed that this policy contributed to his alleged injury.

Second, the County trained its officers that a party may lawfully waive his or her right to judicial process prior to repossession. The Court of Appeal held that the County's adoption of this policy recognizing the validity of due process waivers—in the absence of an exception for "preferred ship mortgages"—caused the officers to violate respondent's rights under the Ship Mortgage Act, thereby rendering the County liable under Section 1983. In fact, the County's generally valid policy did not "cause" any injury to respondent.[12]

More important, to the extent that the County's "waiver" policy "caused" a violation of federal rights, it did so *only* because the County did not give its officers *specific* instruction on "self-help" repossessions (*i.e.*, waiver of judicial process) in connection with preferred ship mortgages. Thus—as the trial court recognized (*supra*, pp. 7-8)—respondent's claim really is not based on any affirmative policy of the County, but rather upon the County's *failure to provide additional training* relating to preferred ship mortgages. This Court always has insisted that the policy on which liability rests must be

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[12] The court below erred in concluding that this "policy" acknowledging the validity of self-help repossessions constituted the "moving force" behind the asserted violation of respondent's asserted statutory rights. *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 694-95 (1978); *see also Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981). As the Court of Appeal recognized, the affirmative policy directive which guided Lieutenant Baca's actions was the obligation to maintain the peace; his training regarding waiver of due process rights at most "colored" his efforts to achieve that end. (App., *infra*, 18a). Respondent failed to show that Lieutenant Baca would not have acted precisely as he did even had he not been trained that due process rights may be waived. Moreover, given the immediate determination by the Superior Court that respondent was not entitled to possession—*i.e.*, the denial of his motions for a preliminary injunction—it simply is not true that the officers' actions were the "moving force" behind respondent's loss of possession of the yacht.

the *direct* cause of the violation of federal rights.[13] The Court of Appeal's focus on petitioner's general policy (of recognizing waivers) rather than the specific "error" alleged (*i.e.*, the failure to train that such waivers do not apply to preferred ship mortgages) violates this principle. What "caused" the purported harm in this case was not the County's generally correct and lawful policy of recognizing waivers, but the *absence* of policy or training that such waivers were not "valid" in the case of preferred ship mortgages.

Because it is the *absence* of "training" regarding preferred ship mortgages that underlies respondent's Section 1983 claim, the imposition of liability on the County is inconsistent with this Court's decisions. Respondent introduced no evidence that the County ever made any *deliberate decision* regarding the application of its policy on repossessions in the context of preferred ship mortgages. Nor did respondent show a pattern of past violations of the Ship Mortgage Act or other circumstances that would make the need for specific training on the Act sufficiently evident to support a finding of deliberate indifference.

To the contrary, the facts absolutely precluded any such finding. As of 1977, there were no reported decisions anywhere in the country addressing whether a self-help provision in a preferred ship mortgage may be enforceable. See *Price* v. *Seattle-First Nat'l Bank*, 582 F. Supp. 1568, 1569 (W.D. Wash. 1983) (court could find no precedent regarding private foreclosure of preferred ship mortgage). In fact, the only decision even to approach the issue had implicitly assumed that self-help foreclosure would be available. *Challenger, Inc.* v. *Durno*, 227 F.2d

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[13] *See City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion) (municipality cannot be held liable for a police officer's unconstitutional shooting of a fleeing suspect simply because the municipality has a "policy" of maintaining a police force); *see also City of Canton* v. *Harris*, 489 U.S. 378, 389 n.9 (1989) (citing *Tuttle*).

918, 922 (5th Cir. 1955). It is thus clear that private repossession under preferred ship mortgages was not a frequently occurring circumstance, nor one that a responsible local government was required—as a matter of federal civil rights law—to address.

C. This Court never has affirmed municipal liability in circumstances such as those posed by this case, in which the municipal policy in question generally is lawful and appropriate. Indeed, in every case in which this Court has imposed municipal liability under Section 1983, the "policy" in question necessarily entailed a violation of federal rights in every situation to which it applied. See, *e.g.*, *Pembaur*, 475 U.S. 469 (authorization of warrantless forcible entry into private premises); *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (decision to terminate employee without hearing); *Monell*, 436 U.S. 658 (policy of forcing pregnant employees to take maternity leave after fifth month). By contrast, the County's policy here accurately and lawfully instructed its employees on a relevant question of federal law. See *D. H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972) (party may contractually waive right to due process before being deprived of property).

It is flatly contrary to prior decisions of this Court to suggest that the County may be liable under Section 1983 for failing to adopt a policy on foreclosure of preferred ship mortgages. The County's only *deliberate* act was the adoption of a *lawful* policy regarding waiver of due process rights in the context of civil repossessions. Where, as here, application of a municipality's policy ordinarily is lawful, the municipality should be held liable for failure to carve out an "exception" to the policy only where the municipality can be said to have been deliberately indifferent to the need for an exception. See *Canton*, 489 U.S. at 388-92. Given that no "deliberate" choice by the County caused respondent's alleged "injury," the imposition of liability under Section 1983 simply cannot be reconciled with the prior decisions of this Court.

The decision below also is inconsistent with the Ninth Circuit's decision in *Merritt* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989). In *Merritt*, the County trained its police officers that an automobile cannot lawfully have two different Vehicle Identification Numbers (VINs) on the dashboard and on the engine block. Following county policy, police officers arrested the driver of a car with conflicting VINs. In fact, due to unusual circumstances on which the officers had not been trained, the divergent VINs on this car were lawful, and the driver sued the County under Section 1983 for unlawful arrest. As in this case, the County's generally correct training of its officers—*i.e.*, that conflicting VINs are unlawful—could be said to have "caused" the driver's arrest. Nonetheless, the Ninth Circuit affirmed a judgment in favor of the County, reasoning that where the County's general policy was lawful and there was no evidence of deliberate indifference in failing to address the unusual exception, the injury could not fairly be attributed to a deliberate policy decision of the County. *Id.* at 771.[14]

A focus on the actual municipal policy that governs the circumstances in question—rather than post-hoc adoption of necessary "exceptions" to otherwise valid policies—is necessary to avoid saddling municipalities with potentially crippling liabilities for their lawful policy and training decisions. The law is replete with rules that are ordinarily valid but to which there may be technical, counter-intuitive exceptions. Clearly, a municipality may, and in some instances must, train its agents regarding these general rules. Where the exception to a rule is a major one

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[14] *See also Buffington* v. *Baltimore County*, 913 F.2d 113, 122-23 (4th Cir. 1990) (county could not be held liable for suspect's suicide where training given to officers did not show deliberate indifference), *cert. denied*, 111 S. Ct. 1106 (1991); *Dorman* v. *District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989) (similar); *Santiago* v. *Fenton*, 891 F.2d 373, 381-82 (1st Cir. 1989) (city's failure to give police officers more than four hours of training in constitutional law did not establish deliberate indifference to citizens' rights).

or one that the agents will frequently encounter or have encountered, the municipality should be expected to adopt a policy on the exception as well. A municipality cannot, however, be expected to anticipate and to provide training on minor exceptions that have not even been established at the time the policy is made. To hold a municipality liable for its innocent failure to anticipate an extraordinary application of its policy would transform the municipal fault standard of Section 1983 into a strict liability standard for local governments.

II. THE SHIP MORTGAGE ACT DOES NOT CONFER FEDERAL RIGHTS ON MORTGAGORS.

A state actor is liable under Section 1983 for subjecting any person to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. A Section 1983 claim does not arise every time a person is harmed as a result of a violation of federal law; rather, Section 1983 is applicable only when federal law confers a *right* upon the person. *Wilder* v. *Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2517 (1990); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 105-06 (1989).[15]

Whether a federal statute creates a right that can give rise to a Section 1983 action is determined by a three-part test:

> In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, [1] creates obligations sufficiently specific and definite to be within the competence of the judiciary to enforce, [2] is intended to benefit the putative plaintiff, and [3] is not foreclosed by express

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[15] Because the Supremacy Clause confers no individual rights, a violation of the Supremacy Clause does not in itself create a cause of action under Section 1983. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107-08 (1989).

> provision or other specific evidence from the statute itself.

Golden State, 493 U.S. at 108 (quotations omitted). In this case, assuming *arguendo* that the Ship Mortgage Act preempts the states from recognizing contractual self-help provision (see *infra*, pp. 19-22), such preemption gives rise to no Section 1983 claim in favor of respondent because the Ship Mortgage Act was not intended to benefit mortgagors.

This Court has applied the "intended to benefit" standard in three cases involving alleged violations of statutory rights under Section 1983, in each of which the Court has found a statutory right. *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987), involved a statute limiting the rent and utility charges that can be imposed on tenants in public housing projects. In that context, "[t]he intent to benefit tenants [was] undeniable." *Id.* at 430. In *Wilder* v. *Virginia Hosp. Ass'n*, the question was whether health care providers are intended beneficiaries of a provision of the Medicaid Act requiring the states to develop plans that provide them with reasonable and adequate reimbursement. Again, the Court held that the statute was intended to benefit health care providers, citing statutory language expressly mentioning providers. 110 S. Ct. at 2517-18; but see *id.* at 2525-27 (Rehnquist, C. J., dissenting) (pointing out absence of language or context specifically indicating rights). Finally, the most difficult question regarding the intended beneficiary of a federal statute arose in *Golden State*. There, the Court determined that because the overriding purpose of the National Labor Relations Act was to create rights in labor and management against each other and against the state, the particular provision at issue should be interpreted as intended to protect employers against state interference. 493 U.S. at 109-12.

This case plainly differs from *Wright*, *Golden State*, and *Wilder* because the Ship Mortgage Act contains no

language that could even arguably be construed as conferring relevant rights or benefits on mortgagors. *Cf. California* v. *Sierra Club*, 451 U.S. 287, 294 (1981) (in context of implying private right of action, statutory right will rarely be found where statutory language does not on its face indicate beneficiary); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 771-73 (1981) (similar); *Cannon* v. *University of Chicago*, 441 U.S. 677, 689-93 (1979) (similar).[16] Moreover, the legislative history of the Act unequivocally demonstrates that the intent of Congress was to benefit mortgagees, not mortgagors. See *infra*, pp. 21-22. Even those courts that have found that the Ship Mortgage Act preempts self-help foreclosures have relied not on federal intent to confer rights upon mortgagors, but on a federal interest in uniform procedures. See App., *infra*, 22a; *Nate Leasing Co.* v. *Wiggins*, 789 P.2d 89, 94-95 (Wash. 1990); *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Fogle*, 637 F. Supp. 305, 306-07 (N. D. Cal. 1985). This clearly is a case in which any preemption "benefits particular parties only as an incident of the federal scheme of regulation," with the result that no remedy under Section 1983 is available. *Golden State*, 493 U.S. at 109; see also *id.* at 110-11 (distinguishing preemption by federal law which confers rights or benefits on private

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[16] In determining whether a federal statute creates an implied private right of action, one consideration is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff?" *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (quoting *Texas & Pac. R. R.* v. *Rigsby*, 241 U.S. 33, 39 (1916)) (emphasis in *Cort*). As this Court has recently noted, implication of a private right of action involves constitutional concerns that are not raised under Section 1983, and the full *Cort* four-part test is therefore inapplicable in Section 1983 cases. *Wilder* v. *Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2517 n.9 (1990). The inquiry into the existence of an underlying federal right is, however, substantially similar in both contexts. *See Golden State*, 493 U.S. at 105-07; *Wilder*, 110 S. Ct. at 2526 (Rehnquist, C. J., dissenting); *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 432-33 (1987) (O'Connor, J., dissenting).

parties from preemption by federal law designed merely to maintain uniform administration).

In affirming respondent's recovery under Section 1983 based on the preemptive effect of the Ship Mortgage Act, the decision below is flatly inconsistent with the prior decisions of this Court. To permit a Section 1983 remedy under such circumstances would effectively read out of the statute the limitation that it protects only "rights, privileges, or immunities," and would subject municipalities to damages actions any time their conduct is found to be in violation of federal law. Given the substantial, and unwarranted, expansion of liability inherent in the application of Section 1983 by the court below, review of this issue by this Court clearly is warranted.[17]

III. THE SHIP MORTGAGE ACT DOES NOT PREEMPT STATE ENFORCEMENT OF CONTRACTUAL PROVISIONS FOR NONJUDICIAL FORECLOSURE.

The Ship Mortgage Act grants the United States district courts exclusive jurisdiction in admiralty over suits *in rem* to enforce the lien in preferred ship mortgages. 46 U.S.C. § 951. The Court of Appeal in this case held that this provision not only preempts the states from entertaining foreclosure suits in their own courts, but also bars them from recognizing contractual provisions for self-help foreclosure. (App., *infra*, 18a-22a). The court held that permitting self-help repossession would "defeat the goal of having uniform procedures on which the

[17] On December 2, 1991, the Court heard argument in *Suter* v. *Artist M.*, No. 90-1488, which raised the question whether the Adoption Assistance and Child Welfare Act of 1980 confers rights on abused or neglected children through its provisions requiring states to adopt foster care and adoption plans including specified features as a condition for receiving federal funds. Because the decision in *Suter* may affect the analysis of when a statute creates a federal right within the meaning of Section 1983, the Court should consider withholding its decision whether to grant certiorari in this case until after *Suter* has been decided. At the very least, it may be appropriate to vacate the judgment below and remand for further consideration in light of *Suter*.

parties to a preferred ship mortgage . . . can rely in the event of a default." (App., *infra*, 22a).

In deciding that the Ship Mortgage Act preempts self-help foreclosure, the Court of Appeal expressly followed a recent decision of the Washington State Supreme Court that reached the same conclusion. *Nate Leasing Co.* v. *Wiggins*, 789 P.2d 89 (Wash. 1990); see also *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Fogle*, 637 F. Supp. 305 (N.D. Cal. 1985). However, both the decision below and the decision of the Washington Supreme Court in *Nate Leasing* directly conflict with the holding of the Alaska Supreme Court in *Brown* v. *Baker*, 688 P.2d 943, 949 (Alaska 1984).[18] The Alaska Supreme Court reasoned that congressional prescription of an exclusive forum and procedure for judicial foreclosure does not affect the separate availability of contractual, nonjudicial remedies under state law. *Id.*

Under the Supremacy Clause, state law will be preempted by a federal statute when the federal statute expressly provides for preemption or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). There will be no preemption, however, "when Congress could have regulated 'a distinctive part of a subject which is peculiarly adapted to a local regulation, . . . but did not.' "

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[18] *See also Dietrich* v. *Key Bank, N.A.*, 693 F. Supp. 1112, 1114-17 (S.D. Fla. 1988) (holding that the Ship Mortgage Act does not preempt self-help foreclosure); *Price* v. *Seattle-First Nat'l Bank*, 582 F. Supp. 1568, 1570 (W.D. Wash. 1983) (holding that the Act does not preempt self-help mortgage provisions, "[t]he validity of [which is an] issue[] for the state to resolve"); *Challenger, Inc.* v. *Durno*, 227 F.2d 918, 919 n.1, 922 (5th Cir. 1955) (assuming validity of contractual provision for self-help foreclosure as basis for decision).

Kalo Brick, 450 U.S. at 317 (quoting *Hines*, 312 U.S. at 68 n.22). In this case, the statute does not expressly preempt contractual self-help provisions. Such provisions should therefore be held preempted only if their use would conflict with the clear intent of Congress in passing the Ship Mortgage Act. See *Kalo Brick*, 450 U.S. at 317; *Florida Lime*, 373 U.S. at 142.

The purpose of the Ship Mortgage Act was to "afford[] substantial security to persons supplying essential financing to the shipping industry." *J. Ray McDermott & Co.* v. *Vessel Morning Star*, 457 F.2d 815, 817 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972) (quoting *Merchants & Marine Bank* v. *The T. E. Welles*, 289 F.2d 188, 193-94 (5th Cir. 1961)). Prior to 1920, there was no federal jurisdiction over a suit to foreclose a ship mortgage. *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 32 (1934). As a result of this circumstance, the "'mortgage security on ships'" was "'practically worthless,'" and investors were reluctant to lend money using ships as collateral. *Id.* at 39 (quoting S. Rep. No. 473, 66th Cong., 2d Sess., p. 9). Congress therefore determined that promotion of the nation's merchant marine required provision of a uniform federal foreclosure remedy so that "'the mortgagee . . . [may be] made more secure in his interest in the vessel than he is under existing admiralty law.'" *Id.* (quoting H. R. Rep. No. 1102, 66th Cong., 2d Sess., p. 34); see also *Nate Leasing*, 789 P.2d at 91; *Dietrich* v. *Key Bank, N.A.*, 693 F. Supp. 1112, 1114 (S. D. Fla. 1988). This purpose of protecting creditors required that the states be precluded from in any way limiting or modifying the judicial foreclosure remedy. See *McDermott*, 457 F.2d at 817-18. Protection of creditors did not, however, require that mortgagors be forbidden from agreeing to self-help foreclosure.[19] Indeed, neither the statutory

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[19] Congress was not interested in uniformity for the sake of uniformity; in fact, while Congress granted the federal courts exclusive jurisdiction over *in rem* foreclosure suits, it permitted the state courts concurrent jurisdiction over *in personam* actions for monetary deficiencies. *See* 46 U.S.C. § 954.

language nor the legislative history indicates any intent to preempt the states from recognizing consensual agreements to permit nonjudicial foreclosure.

The decision of the Alaska Supreme Court in *Brown* v. *Baker* that the Ship Mortgage Act does not preempt contractual self-help provisions is consistent with the language, purpose and history of the Ship Mortgage Act. The contrary conclusion of the court below and the Washington Supreme Court is not. This Court should grant certiorari in order to resolve the conflict over the preemptive effect of the Ship Mortgage Act.[20]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DEWITT W. CLINTON
S. ROBERT AMBROSE
OWEN L. GALLAGHER
Office of the County Counsel
County of Los Angeles
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1891

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
JEFFREY S. STEINBERG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

January 14, 1992

[20] This conflict remains relevant despite the 1988 repeal of the Ship Mortgage Act and recodification of its substantive provisions. *See* supra, p. 2 n.2. In connection with the recodification, Congress expanded the options available for bringing an *in personam* action for indebtedness. *See* H.R. Rep. No. 918, 100th Cong., 2d Sess. 21 (1988), *reprinted in* 1988 U.S. Code Cong. and Admin. News 6104, 6114. The provision for exclusive federal jurisdiction over *in rem* actions that forms the basis for the preemption argument, however, remained substantially unchanged. *See* 46 U.S.C. § 31325(b)(1), (c).

APPENDICES

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B020736

(Super. Ct. No. WEC56172)

RICHARD MEILICKE,
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,
Defendant and Appellant;

LEE BACA,
Defendant and Respondent.

[Filed Jun. 28, 1991]

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Robert C. Nye, Judge. Affirmed.

DeWitt W. Clinton, County Counsel, Owen L. Gallagher, Principal Deputy County Counsel, Lascher & Lascher, Wendy C. Lascher and Susan B. Lascher for Defendant and Appellant and Defendant and Respondent.

Laurence H. Tribe and Kenneth J. Chesebro for Plaintiff and Appellant.

INTRODUCTION

Defendant County of Los Angeles appeals from a judgment in favor of plaintiff Richard Meilicke, also known as Richard Compton.[1] Plaintiff appeals from an order granting a nonsuit in favor of defendants County of Los Angeles and Lee Baca on plaintiff's state law causes of action, from the judgment to the extent it does not include an award of prejudgment interest, and from an order denying his motion for prejudgment interest.[2]

STATEMENT OF FACTS

Background

In 1972, plaintiff purchased his boat, the Magnifico II (Magnifico), a 110-foot former naval vessel, from Anthony Sanucci; title remained in Sanucci's name until plaintiff completed making payments on the boat on October 6, 1977. Plaintiff restored and made significant improvements to the boat until it was elegant and luxurious and lived up to its name. The boat was kept at a dock in Marina del Rey.

The Magnifico also was profitable. Plaintiff initially used it to complement his retail scuba diving business, it was chartered by various businesses and it was used in the production of many movies and television shows. In 1975, plaintiff created a recording studio aboard the boat; it became well-known in the recording industry and was used for recording record albums and demonstration tapes.

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[1] The county also purports to appeal from an order denying its motion to vacate judgment—which is nonappealable (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 111, pp. 128-129)—and an order awarding attorney's fees. Inasmuch as the county makes no contention regarding the latter order, its challenge thereto may be deemed waived. (*Id.*, § 479, pp. 469-471.)

[2] Although Anita Rexroat was a plaintiff below and was included on plaintiff Richard Meilicke's notice of appeal, she has since assigned her interest in the litigation to plaintiff and abandoned her appeal.

The Magnifico also was used by many recording stars for private relaxation and pleasure.

Plaintiff began living aboard the Magnifico in 1973 and kept most of his clothing, personal effects and records on the boat. When he married in early 1977, he also maintained a small apartment in Marina del Rey for use when the boat was chartered by others.

Sometime in 1977, plaintiff became involved in a dispute with the Nicoletti family regarding the Magnifico. In early October, the Nicolettis attempted to take posession of the boat using forged documents from the Department of Motor Vehicles, but plaintiff was able to recover the boat from them with the help of the Los Angeles County Sheriff's Department. Plaintiff attempted to transfer title to the boat to his mother-in-law, Anita Rexroat, in order to keep it from the Nicolettis, but they learned of his attempt and forced him to have Rexroat execute a preferred ship mortgage in favor of Nicolino Nicoletti on October 20. It was stipulated the preferred ship mortgage was "invalid as having been obtained through coercion, the facts of which invalidity were not apparent on the face of the document."

The November 10, 1977 Incident

On the morning of November 10, 1077, two Nicoletti brothers and their attorney, William Davis, came to the Marina del Rey substation of the Los Angeles County Sheriff's Department. There they spoke to defendant Lieutenant Lee Baca, the operations commander, about their intent to repossess the Magnifico, handing him a package of documents which included a copy of the preferred ship mortgage, a notice of default, a Department of Transportation registration document and a handwritten agreement or declaration. Attorney Davis explained the default was the failure to have the boat insured, and articles in the preferred ship mortgage gave Nicolino Nicoletti the right to repossess the boat.

Lieutenant Baca read the documents and concluded the preferred ship mortgage gave Nicoletti the right to repossess the boat. While he was not sure Nicoletti actually was entitled to possession of the boat, he believed the document entitled him to possession.

Lieutenant Baca told the Nicolettis and Attorney Davis the dispute was civil in nature, so the Sheriff's Department could not become involved other than to keep the peace. Attorney Davis indicated his clients wanted to place under citizen's arrest anyone who interfered with their attempt to repossess the boat. Lieutenant Baca told them not to confront plaintiff or his guard on the boat in a hostile manner and suggested that any action should be taken with plaintiff's advance knowledge.

According to Lieutenant Baca, he then telephoned plaintiff, informed him of the Nicolettis' plans and suggested that plaintiff meet with the Nicolettis at his office in order to resolve their dispute peaceably. Plaintiff said the Nicolettis were Mafia members and he feared them, but he nonetheless agreed to meet them at Lieutenant Baca's office that afternoon. Plaintiff said nothing about the preferred ship mortgage having been obtained by coercion and the Nicolettis' previous attempt to obtain the Magnifico. However, according to plaintiff, such a conversation never took place.

Lieutenant Baca sent Deputy Doyle Smith down to the dock to speak to the guard plaintiff had stationed on the Magnifico, "Sandy" Sanderson (Sanderson). Lieutenant Baca told him that the clause in the preferred ship mortgage providing for repossession was valid, but repossession involved a potentially volatile situation. He was to talk to Sanderson, show him the preferred ship mortgage and see if he could get cooperation from him. Deputy Smith could not say what kind of cooperation he was seeking, but explained he was to make clear to Sanderson his option of leaving the boat and avoiding the possibility

of being placed under citizen's arrest if he was perceived as trespassing by the person arresting him; the deputy had determined the Nicolettis felt they now had ownership of the Magnifico and were capable of placing Sanderson under arrest.

Deputy Smith understood the role of the Sheriff's Department in civil disputes was not to take sides or enforce the demands of one side but to remain neutral and maintain the status quo. The department's only duty was to make sure there was no breach of the peace. When he went to the dock to speak to Sanderson, the Nicolettis were not there, so there was no threat of a breach of the peace, but he felt there was the potential for a disturbance at some point. Deputy Smith read the preferred ship mortgage to Sanderson and explained that, according to the document, the ship had reverted to Nicolino Nicoletti. The deputy advised Sanderson if he remained on the boat he could be put under citizen's arrest for trespassing. Sanderson indicated he understood.

Sanderson telephoned plaintiff, who immediately came down to the Magnifico. Deputy Smith told him the same things he had told Sanderson. Plaintiff telephone his attorney, Carleton Russell, for advice. Attorney Russell told him federal law protected the boat from seizure under a preferred ship mortgage except by a federal marshal acting under court process, such as an arrest warrant, and he advised plaintiff to take the boat out to sea to avoid any attempted repossession.

At some point Deputy Smith apparently left the area. Later, Sheriff's Deputy David Cowen, on patrol in his vehicle, heard a radio dispatch regarding a boat theft and proceeded to the dock where the Magnifico was located. Some people by the dock—presumably the Nicolettis, though Deputy Cowen never asked their names—said their boat was being stolen. Deputy Cowen went down onto the dock to the Magnifico, where plaintiff was

preparing to take the boat out. He told plaintiff to stop, but plaintiff did not. He returned to his vehicle and called the dispatcher with the information the Magnifico was being taken out. During this time, Deputy Smith returned to the scene.

Plaintiff took the Magnifico from the dock and attempted to leave the harbor and go out to sea. Lieutenant Baca was notified, and he called the Harbor Patrol. He first testified he told the Harbor Patrol the Magnifico should not leave the harbor because it was involved in an ownership dispute; he was to meet plaintiff and the Nicolettis at the boat at 2:30 that afternoon. He then indicated his understanding at the time of trial was that the Harbor Patrol initially intercepted the boat based on a grand theft call received by them; he did not know who made the call. Lieutenant Baca then testified he based his order that the boat not be allowed to leave he harbor on the grand theft call, in part. He then denied that the Harbor Patrol intercepted the boat based on a civil dispute over ownership or because plaintiff was trying to evade process. He then denied that he ordered that the boat not be allowed to leave the harbor but just mentioned it in response to a Harbor Patrol call.

Sergeant Thomas P. Sherrill and Officers Robert Alan Woolner and Oliver Ray White of the Harbor Patrol went out on a Harbor Patrol boat to intercept the Magnifico. Sergeant Sherrill testified they went out after the Harbor Patrol received a call from the Sheriff's Department requesting backup regarding grand theft. However, on his report and in his deposition he stated the backup request involved an ownership dispute. Officer White testified the call was to intercept the boat and return it to the dock because it was trying to evade civil process; the daily log indicated the call involved a registered owner dispute.

The three officers stopped or slowed the Magnifico and requested that plaintiff return the boat to the dock; plain-

tiff refused to do so and continued going toward the sea. They stopped him a second time, ordered him to return to the dock and threatened to board the boat and arrest him if he did not do so. Plaintiff said he did not want to return because someone was trying to take his boat from him, and he was doing so under duress or protest; he then turned the boat around and returned to the dock, escorted by the Harbor Patrol boat. At the dock, the Harbor Patrol officers boarded the Magnifico.

A number of sheriff's deputies, including Deputies Smith and Cowen, were present at the dock when the Magnifico returned. Deputy Cowen boarded the Magnifico and spoke to plaintiff, explaining he was investigating a possible boat theft. He obtained identification and registration papers from plaintiff, and eventually determined there was no theft but merely a civil dispute over ownership. About this time, plaintiff's wife, Dawn Roddenberry Compton, arrived and boarded the boat. The Nicolettis arrived at the scene and began yelling threats at plaintiff and his wife, who yelled back at them.

Concerned that there might be some kind of confrontation, Deputy Cowen returned to his vehicle and called for a supervisor; Lieutenant Baca responded, and Deputy Cowen left. Plaintiff told Lieutenant Baca he wanted the Nicolettis arrested if they tried to board the Magnifico; the Nicolettis told him they wanted plaintiff arrested because he was on the boat. Lieutenant Baca testified he refused to take plaintiff into custody because of the ridiculousness of the situation. However, he also testified he was obligated to take into custody any person upon whom a citizen's arrest was made, and the law did not give the Sheriff's Department discretion as to whether or not a person placed under citizen's arrest should be taken into custody.

Lieutenant Baca and Deputy Smith attempted to impress upon plaintiff the necessity of leaving the boat and going somewhere else to resolve the ownership question

peaceably. Plaintiff did not want to leave the boat, in that he was afraid the Nicolettis would try to take it. However, he and his wife eventually were escorted off the boat by sheriff's deputies under threat of arrest for breach of the peace. His guard, Sanderson, was taken off the boat in handcuffs. The only person remaining on the boat was Sergeant Sherrill, who was instructed by his supervisor to provide security for the boat.

Plaintiff and Sanderson were driven by Sheriff's deputies to the Marine del Rey substation, where Mrs. Compton joined them. The Nicolettis and Attorney Davis also came to the substation. According to Lieutenant Baca, the parties met and eventually agreed a guard hired by the Nicolettis would be posted on the boat until the dispute between them could be resolved by the court, and none of the parties would board the boat until the dispute was resolved; however, there was no written agreement to that effect. Plaintiff told him he was confident a court would decide the matter in his favor; the lieutenant interpreted this statement to mean he agreed with the Nicolettis as to the posting of a guard until the matter was resolved by a court. Plaintiff never told him he had personal items on the boat he wanted to remove.

Plaintiff denied any such agreement. According to him, he attempted to explain the situation to Lieutenant Baca, including the circumstances under which the preferred ship mortgage had been obtained and the Nicolettis' previous attempt to take the Magnifico using forged documents, but Lieutenant Baca did not want to hear about it. As far as Lieutenant Baca was concerned, the preferred ship mortgage said the Magnifico belonged to Nicolino Nicoletti, and if plaintiff wanted to do anything about the situation he should talk to his attorney. Lieutenant Baca then told plaintiff he was not going to detain him at that time, but if he went back to the boat he would be arrested and jailed. Plaintiff asked Lieutenant Baca to impound the boat, or to allow his own

guard or someone from the Sheriff's Department to stay on the boat to protect his property, but the lieutenant said the Sheriff's Deartment did not do such things and refused. Plaintiff and his wife were allowed to leave, and they did not return to the boat, even to recover their personal property on board.

Sergeant Sherill remained on the Magnifico for 30 to 40 minutes after everyone left. Then a security guard came on board and he left. Sergeant Sherrill understood from Lieutenant Baca the guard was to remain on the boat until the court determined who was entitled to possession of it.

The Nicoletti Litigation

Plaintiff immediately brought suit against the Nicolettis, Attorney Davis and others. He applied for a temporary restraining order and preliminary injunction to recover possession of the Magnifico, but the application was denied. Subsequent requests for an order returning possession of the boat to plaintiff and an injunction to prevent the Nicolettis from moving the boat without first making necessary repairs and providing necessary maintenance also were denied. However, the Nicolettis were enjoined from selling the Magnifico. Ultimately, it was found the preferred ship mortgage was obtained by coercion and plaintiff was awarded over $3.76 million in damages for loss of the boat and his personal property and lost earnings.

The Aftermath

After November 10, 1977, the Nicolettis retained possession of the Magnifico until the State of California foreclosed a tax lien and took the boat to a boat yard, where it remained until July 8, 1980. When plaintiff again was able to obtain possession sometime in 1980, the boat was a shambles: the hull had not been maintained and had suffered extensive corrosion and worm

damage, fittings and equipment had been removed or destroyed. Additionally, most of plaintiff's personal possessions were gone.

As a result of losing the Magnifico, anger at the Sheriff's Department for failure to protect his property and at the litigation process necessary to obtain the boat's return, and having to move in with his mother-in-law while this was going on, plaintiff became severely depressed. He also became obsessed with the litgiation and his attempts to recover the boat. When he finally was able to do so, he decided not to continue his business aboard the boat; he sold boat and business for $55,000 plus a release of other litigation alleged to be worth over $400,000.

County Policy and Training

According to Lieutenant Baca, in a civil dispute or an attempted repossession the Sheriff's Department functions in an impartial manner, does not take sides and does not decide who is right and who is wrong. Its policy is simply to keep the peace and enforce the criminal laws. He acknowledged plaintiff was not arrested for breach of the peace because he quieted down when the lieutenant told him to.

A Sheriff's Department training guide stated that in order to complete repossession, a repossessor must be able to exercise complete dominion and control over the property; the repossessor cannot effect repossession if the owner is in personal possession of the property. If the owner is in possession and objects to the repossession, the repossessor cannot effect repossession and must go to court to seek repossession.

Policy also allowed, and Lieutenant Baca was trained to understand, that parties could legally agree to waive certain rights. A party could agree to allow repossession over his or her objections and thereby waive "due proc-

ess." In his opinion, plaintiff had waived his due process rights in the preferred ship mortgage, so Nicolino Nicoletti did not have to obtain a court order to enforce his rights under the mortgage. Therefore, even though plaintiff objected to repossession by Nicoletti, Lieutenant Baca believed plaintiff's waiver of his due process rights in the preferred ship mortgage gave Nicoletti the right to repossess and board the Magnifico while plaintiff was on the boat and to arrest him for trespassing. Training guide notwithstanding, Lieutenant Baca believed Sheriff's Department policy did not require him to advise Nicoletti to go to court to effect repossession once plaintiff objected.

The lieutenant acknowledged the Sheriff's Department policy manual contained no policies or procedures relative to civil disputes and repossessions. He also had no document or bulletin which changed the guidelines in the training manual that if a person objects to repossession, the repossessor cannot take the property.

Lieutenant Baca had received some training with respect to civil repossessions, but none with respect to enforcement of preferred ship mortgages. He did not understand the difference between federally-documented and state-registered vessels.

PROCEDURAL BACKGROUND

Plaintiff brought this action on October 30, 1978 for deprivation of his property without due process of law, violation of his civil rights within the meaning of 42 United States Code section 1983, trespass and false arrest. Trial was bifurcated, with liability issues to be tried before damages. During trial of liability issues, defendants were granted a nonsuit as to plaintiff's state law claims on the ground of immunity. On June 28, 1984, a mistrial was declared when the jury was unable to reach a verdict. The parties agreed to waive a jury, and the trial court found in favor of plaintiff and against the

county, and in favor of Lieutenant Baca and against plaintiff, on the issue of liability.

Trial then was held on the damages issue. On July 2, 1985, defendant county requested a statement of decision as to the liability determination. The trial court issued a tentative decision covering both liability and damages issues but denied the request for a statement of decision insofar as it requested explanation beyond those set forth in the tentative decision. Defendant county filed another request for a statement of decision, requesting findings on issues of liability and damages. Again, it was denied except as to those issues already addressed in the tentative decision. Defendant county then filed a notice of the court's failure to resolve controverted issues or ambiguities in the tentative decision.

Plaintiff moved to have prejudgment interest inserted in the judgment. This motion was denied without prejudice. Plaintiff renewed it, but it again was denied. Shortly thereafter, judgment was entered; the judgment addressed both liability and damages.

The damages awarded included $3 million for the Magnifico and $516,063 for plaintiff's personal property aboard the boat. The trial court awarded lost profits of $2,483,292 from November 10, 1977 through May 29, 1985, and continuing at $901.36 per day until paid. It also awarded $42,529 for the expenses plaintiff incurred in attempting to recover the Magnifico and $750,000 as general damages for emotional distress and physical and mental suffering.

CONTENTIONS

Defendant's Appeal

I

Defendant County of Los Angeles contends its failure to adopt a policy concerning preferred ship mortgages did not violate plaintiff's constitutional rights and support a

judgment of liability under 42 United States Code section 1983.

II

Defendant further contends plaintiff's losses were not caused by the actions of its Sheriff's Department.

III

Defendant finally asserts the damage award must be reversed, in that it includes improper elements and violates controlling principles.

Plaintiff's Cross-Appeal

IV

Plaintiff contends the trial court's failure to award any prejudgment interest should be taken into account in scrutinizing the damage award and on any remand.

Plaintiff's Appeal

V

Plaintiff asserts the trial court erred in granting defendant Lee Baca qualified official immunity under 42 United States Code section 1983.

VI

Plaintiff additionally asserts the trial court erred in granting defendants immunity under the California Tort Claims Act.

DISCUSSION

I

Defendant's Appeal

Defendant County of Los Angeles contends its failure to adopt a policy concerning preferred ship mortgages did not violate plaintiff's constitutional rights and support a judgment of liability under 42 United States Code section 1983. We disagree.

Preliminarily, we address the propriety of the trial court's denial of defendant's request for a statement of decision. Although defendant makes no contention as to this issue, it is discussed in the parties' briefs and the lack of a statement of decision affects this court's review of the facts.

Pursuant to section 632 of the Code of Civil Procedure, a statement of decision is required only on request of a party made within 10 days after the announcement of a tentative decision. Rule 232 of the California Rules of Court prescribes the procedures for announcing a tentative decision and issuing a statement of decision. Rule 232.5 provides: "When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried and shall, when requested pursuant to Code of Civil Procedure section 632, issue a statement of decision as prescribed in rule 232; but no proposed judgment shall be prepared until the other issues are tried . . . ."

Pursuant to the foregoing, when trial is bifurcated and a tentative decision announced as to the first issue to be tried, a statement of decision as to that issue must be requested within 10 days thereafter. A party cannot wait for the remaining issues to be tried then, upon the trial court's issuance of a tenative decision covering those issues, request a statement of decision as to all issues tried.

Here, the trial court made findings on the liability issues on June 28, 1984. Defendant did not request a statement of decision until the court announced its tentative decision on all issues following trial of the damages issues, on July 2, 1985. The request was not timely, therefore the trial court was not required to issue a statement of decision on the liability issues.

Where there is no statement of decision, the appellate court must assume the trial court found every fact necessary to support the judgment. (*Noguchi* v. *Civil Service Com.* (1986) 187 Cal.App.3d 1521, 1536; *Golde* v. *Fox* (1979) 98 Cal.App.3d 167, 174.) We will search the record only to determine whether the judgment is supported by substantial evidence. (*Noguchi*, *supra*, at p. 1536; *Golde*, *supra*, at p. 174.)

Turning now to the issue of liability, 42 United States Code section 1983 (hereinafter section 1983) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." A municipality can be held liable under section 1983 only where the municipality itself causes a violation of the plaintiff's federal constitutional rights. (*Canton* v. *Harris* (1989) 489 U.S. 378, 385.) This occurs " 'when the "execution of the government's policy or custom . . . inflicts the injury." ' " (*Ibid.*) There must be a direct causal connection between the municipality's policy or custom and the violation. (*Ibid.*) And unlike the situation where liability is sought to be imposed on the municipality's employees, there is no qualified immunity available to the municipality based on its good faith. (*Owen* v. *City of Independence* (1980) 445 U.S. 622, 649-650; *Novick* v. *City of Los Anegeles* (1983) 148 Cal.App. 3d 325, 331.)

Even if the policy itself is not unconstitutional, a municipality may be held liable if its failure to train its employees or inadequate training of its employees as to the application of the policy results in a constitutional violation. (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 387.) However, liability may be imposed "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact." (*Id.* at p. 388, fn. omitted.) Since liability can be

imposed only where the municipality's policies are the " 'moving force [behind] the constitutional violation,' " only a " 'deliberate indifference' " standard applied to a failure to train will elevate the municipality's shortcoming to " 'policy or custom.' " (*Id.* at p. 389.) The municipality must have made a deliberate or conscious choice to follow a particular alternative in order to be held liable. (*Ibid.*)

While it may seem unlikely a municipality would have a policy of not taking reasonable steps to train its employees, "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need." (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 390, fn. omitted.) In such a case, the failure to provide adequate training may be said to represent a policy for which the municipality is responsible and may be held liable if it causes injury. (*Ibid.*)

The adequacy of the municipality's training must be evaluated in light of the tasks assigned to the employee. (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 390.) Liability will attach only where the injury would have been avoided had the employee been properly trained. (*Id.* at p. 391.)

It may be noted that while *Canton* v. *Harris*, *supra*, speaks of constitutional rights, section 1983 also applies to rights secured by federal statutory law. (*Maine* v. *Thiboutot* (1980) 448 U.S. 1, 4-8.) And the principles enunciated in *Canton* apply to counties as well as municipalities. (See *Polk County* v. *Dodson* (1981) 454 U.S. 312, 326; *Merritt* v. *County of Los Angeles* (9th Cir. 1989) 875 F.2d 765, 769.)

Here, the parties are in disagreement over whether this is an illegal policy case or a failure to train case. While defendant frames its contention in terms of failure

to adopt a policy concerning preferred ship mortgages, it argues it should not be held liable under section 1983 for its failure to train its deputies concerning preferred ship mortgages. Plaintiff insists this is not a failure to train or failure to adopt a policy case but a case of unlawful policy.

The trial court found "that while Los Angeles [County] Sheriff's Department trains its officers and has a policy generally with respect to the rights of those involved in mortgage transactions and generally with respect to their conduct when responding to scenes of civil disputes, and generally with respect to how to handle repossessions and disputes arising therefrom, nevertheless, their training with respect to the handling of such disputes arising from enforcement of preferred ships mortgages and with respect to Admiralty Law was either nonexistent, or so inadequate as to amount to the Los Angeles County Sheriff's Department's having no understandable policy as to such matters.

"In a situation such as presented here, where the Sheriff's Officers and Harbor Patrol Officers would have to have such information because of their assignment and duty at Marina del Rey, this lack of policy led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights. The Los Angeles County Sheriff's Department knew, or should have known that such results could occur in the absence of a definite and understandable policy."

The foregoing shows the trial court found both a lack of training and a lack of policy regarding repossession under preferred ship mortgages. However, the lack of training resulted from the lack of policy. Thus, this is not a failure to train case, but a case either of a policy which may violate federal statutory law, or of a lack of policy which may "amount[] to deliberate indifference to the rights of persons with whom the [sheriff's deputies]

come into contact" (*Canton* v. *Harris, supra*, 489 U.S. at pp. 385, 388), which resulted in the deprivation of plaintiff's federal statutory rights.

It is admitted the Sheriff's Department had no specific policy regarding repossessions under preferred ship mortgages. Its policy was to treat all civil repossessions alike: The Sheriff's Department was to function in an impartial manner, not taking sides or determining who was right or wrong, but merely ensuring no breach of the peace took place. Generally, repossessions could not be effected if the owner was in personal possession of the property and objected to repossession. However, Lieutenant Baca testified, policy allowed that if the parties agreed to waive their due process rights, repossession could be effected even over the owner's objection.

It is clear to us defendant did have a policy to permit self-help in civil repossessions if the parties waived due process rights and that policy was applied here. The deputies' main goal in the actions they took was to prevent a breach of the peace, but Lieutenant Baca's handling of the situation was colored by his belief plaintiff had waived his due process rights and Nicolino Nicoletti therefore was entitled to immediate possession of the Magnifico, even over plaintiff's objection. There being a policy, the question is whether there is substantial evidence to support the conclusion this policy violated plaintiff's federal statutory rights. (*Canton* v. *Harris, supra*, 489 U.S. at p. 385.)

The rights at issue are those contained within the Ship Mortgage Act of 1920 (46 U.S.C. § 911 et seq.,[3] hereinafter Ship Mortgage Act or Act), which governs preferred ship mortgages (*Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle* (N.D.Cal. 1985) 637 F.Supp. 305, 306). The Act provides in pertinent part: "A preferred mortgage shall constitute a lien upon the mortgaged vessel in

[3] The Act was repealed in 1988 (102 Stat. 4752).

the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. . . ." (46 U.S.C. § 951.)

Plaintiff insists this language makes it perfectly clear the mortgagee under a preferred ship mortgage cannot take advantage of self-help repossession upon default, but may only enforce the lien through a suit in rem in admiralty in federal court. Therefore, plaintiff claims, defendant's policy which "authorized police actions that afforded legitimacy to the self-help repossessor" is unlawful and provides a basis for imposition of liability on defendant under section 1983.

The language of the Ship Mortgage Act is not that clear, as evidenced by the different conclusions as to its meaning reached by various courts. In *J. Ray McDermott & Co., Inc.* v. *Vessel Morning Star* (5th Cir. 1972) 457 F.2d 815, certiorari denied 409 U.S. 489, it was noted the purpose of the Ship Mortgage Act was to provide a uniform body of maritime law. (At p. 817.) Where there were gaps in the law, state law could be employed, but it could not be employed to contravene the Act or disrupt the uniformity the Act sought to bring. (*Id.* at p. 818.) *Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle*, *supra*, 637 F.Supp. 305 similarly held the Ship Mortgage Act applies to all foreclosures on preferred ship mortgages, and a suit to foreclose must be brought in federal court. (At p. 306.) It further held the parties to a preferred ship mortgage could not reserve rights in conflict with the provisions of the Act. (*Id.* at p. 307.) However, *Price* v. *Seattle-First Nat. Bank* (W.D.Wash. 1983) 582 F.Supp. 1568, 1569-1570 suggested that while the Ship Mortgage Act granted exclusive jurisdiction to the federal courts with respect to preferred ship mortgages,

parties to such mortgages could provide for additional contract remedies to those available through the Act, including self-help provisions enforceable in state court.

In *Dietrich* v. *Key Bank, N.A.* (S.D.Fla. 1988) 693 F.Supp. 1112, the issue was whether the Ship Mortgage Act permits parties to a preferred ship mortgage to contractually agree the mortgagee may use state-law self-help procedures to repossess the vessel. (At p. 1114.) The court noted that in *Challenger, Inc.* v. *Durno* (5th Cir. 1956) 227 F.2d 918, it was found such an option was available to the mortgagee. (*Dietrich*, *supra*, at p. 1115.) *Dietrich* held *McDermott* did not overrule *Challenger*, in that it did not involve a contractual agreement between the parties to allow state-law remedies. (*Id.* at p. 1116.) The court concluded state-law self-help was permissible by agreement, based on *Challenger* and declining to follow *Fogle*. (*Id.* at pp. 1116, 1117.) However, in *Nate Leasing Co., Inc.* v. *Wiggins* (1990) 114 Wash.2d 508 [789 P.2d 89], it was concluded that given the history and purpose of the Ship Mortgage Act, *Fogle* appeared to be better reasoned than *Dietrich*, and the Act allows no room for state law in foreclosure on a preferred ship mortgage. (789 P.2d at pp. 94-95.)

It may be noted *Challenger, Inc.* v. *Durno*, *supra*, 227 F.2d 918, on which *Dietrich* relied, did not discuss or analyze the question whether the Ship Mortgage Act allowed state-law self-help procedures to repossess a vessel subject to a preferred ship mortgage. *Challenger* simply stated that the mortgagee could effect a private foreclosure or foreclosure under the preferred ship mortgage. (At p. 922.)

In *Fogle*, plaintiff conceded the Ship Mortgage Act controlled foreclosure on a preferred ship mortgage but contended the Act was silent as to whether mortgagees could conduct private foreclosure sales, therefore a mortgagee was free to contractually reserve the right to do so.

(*Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle*, *supra*, 637 F.Supp. at p. 306-307.) The court noted the Act made provision for judicially-approved private sales. (*Id.* at p. 307.) It concluded, by providing a specific, detailed procedure for doing so, the statute was hardly silent on the question, and "Congress obviously meant to disapprove of extrajudicial private sales. There is, therefore, 'simply no room for the operation of state law' on the issue of whether extrajudicial private sales are permissible." (*Ibid.*) Thus plaintiff had no right to conduct a private foreclosure sale pursuant to state law. (*Ibid.*)

Nate Leasing Co., Inc. v. *Wiggins*, *supra*, 789 P.2d 89, in analyzing *Dietrich* and *Fogle*, first discussed the history of the Ship Mortgage Act. Citing *J. Ray McDermott & Co., Inc.* v. *Vessel Morning Star*, *supra*, 457 F.2d at pages 817-818, the court noted prior to the enactment of the Ship Mortgage Act, ship mortgages could not be foreclosed in admiralty and so were "practically worthless." (*Nate Leasing Co., Inc.*, *supra*, at p. 91.) In order to promote the merchant marine and encourage shipping, the Act was passed; it gave preferred status to mortgagees and brought foreclosure on preferred ship mortgages within the admiralty jurisdiction of the federal courts. (*Ibid.*) It was the intent of the drafters to provide speedy and uniform procedures for foreclosure, so "'the Act would wholly and completely supersede state law and practice in every respect.'" (*Ibid.*, quoting from *J. Ray McDermott & Co., Inc.*, *supra*, at p. 818.)

With this history as a backdrop, the court addressed the question whether the Ship Mortgage Act allowed "[t]he utilization of state law self-help procedures to take possession of and sell a ship covered by a preferred ship mortgage" (*Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d at p. 92). The court found only four cases dealing with the question. One was *Price* v. *Seattle-First Nat. Bank*, *supra*, 582 F.Supp. 1568, two others were *Fogle* and *Dietrich*. The fourth was *Brown* v. *Baker*

(Alaska 1984) 688 P.2d 943, in which "the court found that, because the vessel was voluntarily returned to the mortgagee after default, there was 'no foreclosure action and therefore the Ship Mortgage Act [was] inapplicable.'" (*Nate Leasing Co., Inc., supra*, at pp. 92, 93, emphasis omitted.) In the view of the court in *Nate Leasing Co., Inc.*, the Alaska court in *Brown* "seem[ed] to be saying that parties who avail themselves of the protection of a preferred ship mortgage may nonetheless render the statute inapplicable simply by choosing not to follow the procedures set forth in the statute." (*Id.* at p. 93.)

The four cases cited varied in reasoning and result. Of the four, the court found *Fogle* the best reasoned, relying on the strong statements in *J. Ray McDermott & Co., Inc.* v. *Vessel Morning Star*, *supra*, 457 F.2d 815 regarding congressional intent that the Ship Mortgage Act provide uniform procedures for foreclosure on vessels subject to preferred ship mortgages. (*Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d at pp. 94-95.) Thus, the court concluded there was no room for state law in the foreclosure of a preferred ship mortgage but the Ship Mortgage Act provided the exclusive remedy. (*Id.* at p. 95.)

We agree with both the reasoning and holding of *Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d 89. Allowing parties to a preferred ship mortgage to reserve rights under state law defeats the purpose of the Ship Mortgage Act—to provide for exclusive jurisdiction of the admiralty court and uniform procedures for foreclosure proceedings. We further conclude this reasoning applies not only to foreclosures under state law, but to self-help repossession as well. Allowing such actions would also defeat the goal of having uniform procedures on which the parties to a preferred ship mortgage—or their successors in interest—can rely in the event of a default.

Accordingly, in this case, Nicolino Nicoletti had no right to take advantage of self-help repossession upon any default in the terms of the preferred ship mortgage on the Magnifico. Plaintiff had the federal statutory right not to have the boat taken from him unless the procedures set forth in the Ship Mortgage Act were complied with, which did not occur. Therefore, defendant's policy, which enabled Nicoletti to obtain immediate possession of the Magnifico over plaintiff's objection without having him go through "due process," violated plaintiff's federal statutory rights. This being the case, defendant may be held liable for the violation under section 1983. (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 385.)

Defendant claims there cannot be anything unlawful about a policy of keeping the peace in the same manner, regardless of the type of property in dispute, and it cannot be faulted for refusing to ignore a potentially violent confrontation over a preferred ship mortgage. If defendant's policy were simply to keep the peace, this claim would have merit. However, defendant's policy, and the actions taken to effect it, went beyond mere peacekeeping. The policy included assisting in self-help repossessions where it was determined one party to the mortgage had waived "due process" and the right to object to the repossession. In the case of a preferred ship mortgage, such a waiver is not valid and there is no right to self-help repossession. But here the waiver was given effect and defendant's employees assisted in the self-help repossession by forcing plaintiff to bring the Magnifico back to the dock, by forcing him and his security guard off the boat, and by allowing the Nicolettis to place their guard on the boat and refusing to allow plaintiff or his wife to return to the boat. Since defendant's policy and actions went beyond mere peacekeeping, it cannot escape liability.

Defendant further claims it cannot be held liable under section 1983 for merely enforcing state law regarding keeping the peace in civil disputes, citing, following oral

argument, *Surplus Stove and Exchange, Inc.* v. *City of Delphi* (7th Cir. 1991) 928 F.2d 788, 791-792. Again, since defendant's policy and actions went beyond peacekeeping, defendant was not merely enforcing state law. Moreover, as plaintiff points out, a county may be found liable under section 1983 for merely enforcing state law where to do so violates federal constitutional or statutory rights. (See *Howlett by and Through Howlett* v. *Rose* (1990) —— U.S. ——, —— [110 S.Ct. 2430, 2443]; *Evers* v. *County of Custer* (9th Cir. 1984) 745 F.2d 1196, 1203.)

Defendant also suggests, in any event, plaintiff cannot claim on appeal this is an unlawful policy case, in that plaintiff claimed at trial it was a failure to train case. However, the record shows plaintiff argued both theories to the jury. The parties also cite various parts of the record in support of their claims this is or is not a failure to train or unlawful policy case. The informal statements by the trial court on which they rely are not the judgment and cannot be used to contradict or "interpret" an unambiguous judgment. (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 5, pp. 455-456; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 264, p. 271.) The judgment is clear the trial court found a "lack of policy [which] led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights." It also found a lack of or inadequate training, but that lack or inadequacy was simply a result of the lack of policy. Inasmuch as the judgment is clear, the trial court's informal statements canont be used to contradict or explain it.

II

Defendant further contends plaintiff's losses were not caused by the actions of its Sheriff's Department. Again, we disagree.

Defendant first argues that even if its deputies had been properly trained regarding preferred ship mort-

gages, they would have taken the same actions in order to prevent a breach of the peace; therefore, any deficiencies in the training did not cause plaintiff's injuries (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 385). As discussed in part I, *ante*, this case cannot be treated simply as a failure to train case but must be viewed as a case involving an unlawful policy. Additionally, the actions of the deputies were designed not only to prevent a breach of the peace but also to assist Nicolino Nicoletti in repossessing the Magnifico.

If defendant's policy on repossessions had recognized that there can be no self-help repossession under a preferred ship mortgage but the mortgagee must seek relief in the admiralty court, and if defendant's training of its deputies reflected this policy, it is reasonable to conclude the deputies would not have had the Harbor Patrol bring plaintiff back to the dock when he sought to take the Magnifico out to sea to avoid the attempted repossession. Neither would they have forced defendant and his security guard off the boat or refused to allow defendant and his wife to return to the boat and allowed the Nicolettis to place their security guard on the boat once the meeting with the Nicolettis had taken place. Had they not taken the foregoing actions, plaintiff would have retained possession of the Magnifico and avoided his injuries.

Defendant next argues the judicial determination in the action plaintiff brought against the Nicolettis that plaintiff was not entitled to possession of the Magnifico, when the court in December 1977 denied plaintiff a temporary restraining order and preliminary injunction transferring possession back to him, cut off any potential liability of defendant. Citing *Novick* v. *City of Los Angeles*, *supra*, 148 Cal.App.3d at pages 332-333, defendant claims the court's independent exercise of its judgment severed the chain of causation between any section 1983 violation and any subsequent damage to the Magnifico.

However, *Novick* is distinguishable. In *Novick*, the section 1983 violation was an illegal search by police officers and the injury was the filing of criminal charges by the city prosecutor. The court concluded the chain of causation between the two was severed by the exercise of the prosecutor's independent judgment in deciding to file the criminal charges. (*Novick* v. *City of Los Angeles*, *supra*, 148 Cal.App.3d at pp. 332-323.) Here, by contrast, the exercise of the court's independent judgment in the Nicoletti action did not cause plaintiff's injury but merely failed to prevent exacerbation of an injury which already had occurred. Defendant does not argue this type of failure breaks the chain of causation.

Defendant finally claims it cannot be held responsible for damages caused by the unforseeable acts and omissions of third parties—the Nicolettis. No special relationship existed between it and plaintiff requiring it to protect plaintiff's property against damage by the Nicolettis, and it cannot be held liable for damage and deterioration occurring a significant period of time after the acts upon which its liability was based.

One may be held liable if his conduct is "a substantial fatcor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his . . . conduct. [Citation.] Moreover, if the likelihood that a third person may act in a particular manner, whether innocent, negligent, intentionally tortious, or even criminal, is one of the hazards which makes the actor['s conduct wrongful,] the actor will remain liable for the harm caused by that [conduct]. [Citation.]" (*Earp* v. *Nobmann* (1981) 122 Cal.App.3d 270, 292-293, disapproved on other grounds in *Silberg* v. *Anderson* (1990) 50 Cal.3d 205, 219; accord, *Vesely* v. *Sager* (1971) 5 Cal.3d 153, 163.)

Here, plaintiff told Lieutenant Baca the Nicolettis were criminals, they previously had attempted to take the Mag-

nifico from him using forged documents and they had obtained the preferred ship mortgage through coercion. He also said he had personal property on the boat for which he wanted protection. Under these circumstances it was reasonably foreseeable the Nicolettis would convert, damage or destroy the boat and plaintiff's other property if given the opportunity to do so. Moreover, the only reason the Nicolettis were able to do so was through Lieutenant Baca's conduct; had he allowed plaintiff to remove the boat from danger, the Nicolettis would not have been able to take possession of the boat. Accordingly, defendant may be held liable for the damage to the boat and plaintiff's property by the Nicolettis. (*Earp* v. *Nobmann, supra*, 122 Cal.App.3d at pp. 292-293.)

As to the deterioration of the Magnifico occurring while the Nicolettis were in possession of the boat, it is fundamental an injured party should be compensated for all damage proximately caused by a wrongdoer. (*Curlender* v. *Bio-Science Laboratories* (1980) 106 Cal.App.3d 811, 830.) Damage proximately caused by a wrongdoer may include damage caused by the elements. See *Poulsen* v. *Charlton* (1964) 224 Cal.App.2d 262, 270.) Defendant's actions allowed the Nicolettis to take the Magnifico from plaintiff and prevented plaintiff from having the necessary maintenance performed, which in turn allowed the boat to deteriorate due to exposure to the elements. Defendant cites no authority to support its argument this deterioration was not proximately caused by the actions of its sheriff's deputies. Accordingly, defendant properly was held liable for this damage. See *People* v. *Dougherty* (1982) 138 Cal.App.3d 278, 282-283.)

III

Defendant finally asserts the damage award must be reversed, in that it includes improper elements and violates controlling principles. While the assertion has some

merit, defendant has not demonstrated entitlement to relief.

The level of damages to be awarded in a section 1983 action is determined according to common law principles, which are designed to provide " 'compensation for the injury caused to plaintiff by defendant's breach of duty.' " (*Memphis Community School Dist.* v. *Stachura* (1986) 477 U.S. 299, 306, emphasis omitted.). (*Compensation for the injury* is the key to determining whether the level or an element of damages is appropriate. (*Id.* at p. 307.) This compensation may include out-of-pocket expenses, other monetary damages, and damages for mental anguish and suffering. (*Ibid.*)

In making the determination as to the damages to be awarded a plaintiff pursuant to section 1983, the court should look first to federal law and, if necessary, then to state law. (*Gilmere* v. *City of Atlanta, Ga.* (11th Cir. 1989) 864 F.2d 734, 737-739, cert. den. —— U.S. —— [107 L.Ed.2d 37]; see 42 U.S.C. § 1988.) The key to deciding which law to apply is determining which law will better serve the policy expressed in section 1983 of compensating the plaintiff for the actual injuries suffered. (*Gilmere, supra,* at p. 739.)

Defendant challenges the award of damages here in several aspects. First, it contends the judgment in plaintiff's action against the Nicolettis collaterally estops plaintiff from obtaining a higher award against it in this action. Plaintiff claims defendant waived this contention by failing to raise the issue below. However, the record shows the trial court took judicial notice of the proceedings in the Nicoletti action, and defendant argued its collateral estoppel theory to the trial court. Accordingly, the contention is not waived for failure to raise it below. (See *Dimmick* v. *Dimmick* (1962) 58 Cal.2d 417, 422-423.)

Collateral estoppel bars relitigation of all factual issues actually litigated and necessarily decided in prior litigation. *Alhino* v. *Starr* (1980) 112 Cal.App.3d 158, 170; *Americana Fabrics, Inc.* v. *L. & L. Textiles, Inc.* (9th Cir. 1985) 754 F.2d 1524, 1529.) It may be applied if the issues decided in the prior adjudication are identical to those raised in the present action, there was a final judgment on the merits in the prior adjudication, and the party against whom the doctrine is sought to be applied was a party to the prior adjudication. (*Clemente* v. *State of California* (1985) 40 Cal.3d 202, 222.) It also may be applied to a section 1983 action. (*Allen* v. *McCurry* (1980) 449 U.S. 90, 96-105; *Novick* v. *City of Los Angeles, supra*, 148 Cal.App.3d at p. 331.)

If an issue decided in the Nicoletti action was the extent of plaintiff's damages resulting from the loss of the Magnifico and the extent of the damage to the Magnifico itself, and this same issue arose in the instant action, the issues are identical. One of the issues to which collateral estoppel may be applied is the extent of damages. (*Klinell* v. *Shirey* (1963) 223 Cal.App.2d 239, 244; see, e.g., *Ellena* v. *State of California* (1977) 69 Cal.App.3d 245, 254.)

The parties originally characterized the judgment in the Nicoletti action as a default judgment.[4] For the purpose of applying collateral estoppel, it is a final judgment on the merits. (*Kahn* v. *Kahn* (1977) 68 Cal.App.3d 372, 382; *Martin* v. *General Finance Co.* (1966) 239 Cal.App. 2d 438, 443.) A default judgment " 'is as conclusive as to the issues tendered by the complaint as if it had been ren-

[4] Following oral argument, we requested letter briefs from the parties addressing the collateral estoppel issue. In its brief, defendant characterizes the judgment in the Nicoletti action as a summary judgment. Comments by plaintiff's trial counsel suggest there was a default, but the prove-up of damages was on a summary judgment motion. Plaintiff does not contend collateral estoppel would not apply to a summary judgment.

dered after answer filed and trial had on allegations denied by the answer.'" (*Ibid.*; *Mitchell* v. *Jones* (1959) 172 Cal.App.2d 580, 586.)

Plaintiff was a party to the Nicoletti action. While defendant was not, this does not defeat application of collateral estoppel. The doctrine may be asserted offensively by one not a party to the prior action. (*Bernhard* v. *Bank of America* (1942) 19 Cal.2d 807, 811-812; *Mountain Home Properties* v. *Pine Mountain Lake Assn.* (1982) 135 Cal.App.3d 959, 964.) The elements of collateral estoppel being met here, it properly could have been applied to the trial court's decision with respect to the amount of damages suffered by plaintiff.

Plaintiff asserts, without citation to any authority (see *People* v. *Dougherty*, *supra*, 138 Cal.App.3d at pp. 282-283), collateral estoppel should not be applied, in that, because the prior action involved a default judgment, "he had no incentive to fully develop damages evidence (because he predicted, correctly, that the Nicolettis could not pay any substantial judgment)." Further, the issues in the two cases are not identical: the Nicoletti action involved only a prove-up of the default, proof plaintiff's damages were at least what he claimed they were: Finally, application of collateral estoppel would seriously undermine the policies behind section 1983 by denying him compensation from a government entity which violated his rights "merely because [he] had previously 'won' an empty judgment against a joint tortfeasor."

These assertions are devoid of merit. That the judment in the Nicoletti action was the result of a default is of no significance; it is treated the same as a judgment on the merits following trial (*Martin* v. *General Finance Co.*, *supra*, 239 Cal.App.2d at p. 443). Plaintiff points to no evidence he failed to fully develop damages evidence at the default prove-up because he predicted the Nicolettis would not be able to pay any substantial judgment. Moreover, plaintiff's failure to raise certain matters in the

Nicoletti action action would not defeat the application of collateral estoppel to those issues he actually litigated. "[O]nce an issue is litigated and determined, it is binding in a subsequent action notwithstanding that a party may have omitted to raise a matter for or against it which, if asserted, might have produced a different outcome." (*Alhino* v. *Starr*, *supra*, 112 Cal.App.3d at p. 170; *Kingsbury* v. *Tevco, Inc.* (1978) 79 Cal.App. 314, 318.)

Additionally, we hardly consider an award of $3,766,055 to be "an empty judgment." And it appears as though there might be some damages issues which were not litigated in the Nicoletti action which could have resulted in an additional award to plaintiff. Thus, the policies behind section 1983 are not seriously undermined by application of collateral estoppel in this case. (See *Mountain Home Properties* v. *Pine Mountain Lake Assn.*, *supra*, 135 Cal.App.3d at pp. 964-965.)

As previously mentioned, collateral estoppel properly could have been applied on the issue of damages.[5] However, defendant has failed to establish the facts foundational to application of collateral estoppel—the damages issues actually litigated in the Nicoletti action and, specifically, which items of damages were included in the $3.75 million award of special damages in that action. Defendant merely speculates as to which items must have been included.

We examined the superior court file in the Nicoletti action, of which both we and the trial court took judicial notice, but it provides no illumination. It indicates all exhibits on the damages issues were returned to plaintiff; there are no copies in the file. Neither is there a reporter's transcript of the hearing on the prove-up.

Absent evidence establishing which items of damages were included in the award in the Nicoletti action, neither

[5] Neither the judgment nor the statement of decision gives any indication whether the trial court did so.

we nor the trial court can actually apply collateral estoppel to the judgment. Defendant having failed to meet its burden of proof on this issue (Evid. Code, § 500), there would be no error in the trial court's failure to apply collateral estoppel, if indeed it did fail to do so. Defendant also having failed to meet its burden on appeal of demonstrating error, it is not entitled to relief based on the application of collateral estoppel. (*People* v. *Clifton* (1969) 270 Cal.App.2d 860, 862.)

Defendant also contends the damages award does not take into account plaintiff's duty to mitigate damages (*Murphy* v. *City of Flagler Beach* (11th Cir. 1988) 846 F.2d 1306, 1308-1309). Defendant argues: "By selling his business to Fischer, plaintiff . . . abandoned any claim for profits he could have earned had he continued operating a recording studio or charter boat business. [¶] Concededly, [plaintiff] testified he could not work after losing the [Magnifico]." The reason for this was his full-time occupation with the litigation. "In other words, [plaintiff] decided not to mitigate his damages so he could spend more time trying to recover damages." This does not relieve plaintiff of the duty to mitigate; moreover, plaintiffs in civil rights cases are entitled to attorneys fees, which plaintiff recovered, so it was not necessary that he spend all his time on the litigation.

Defendant neglects to mention that not all of plaintiff's litigation efforts were part of his civil rights action; some were aimed at recovering the Magnifico. Further, once plaintiff did recover the boat, it was in no condition to enable him to continue his business and plaintiff may not have had the financial ability to restore it to its former condition. Defendant cites nothing in the record and no authority to show the issue of mitigation was raised below and erroneously ruled upon by the trial court. Therefore, this contention has been waived on appeal. (*People* v. *Dougherty*, *supra*, 138 Cal.App.3d at pp. 282-283.)

Defendant next contends plaintiff's award of damages for emotional distress included improper elements, in that it awarded plaintiff damages for distress caused by the actions of the Nicolettis, not defendant; defendant acknowledges damages for emotional distress properly may be awarded in a section 1983 action (*Memphis Community School Dist.* v. *Stachura*, *supra*, 477 U.S. at p. 307). In view of the conclusion reached in part II, *ante*, regarding causation, this contention is without merit, and defendant has not demonstrated the award of damages for emotional distress included any improper elements.

Defendant finally contends the award of interest on the continuing award of lost profits effects a double recovery for plaintiff. The judgment awarded plaintiff lost profits of $2,483,292.60 through May 29, 1986, "and continuing on a daily basis until paid, in the amount of $901.36 per day." It also awarded "interest on the above-mentioned sum at the rate of 10% per annum."

Defendant does not explain how awarding 10 percent interest on the unpaid lost profit awards effects a double recovery rather than making plaintiff whole for the lost profits and the lost opportunity of investing those profits. Defendant originally cited no authority in support of its contention, rendering this contention without merit and effectively waived as well (*People* v. *Dougherty*, *supra*, 138 Cal.App.3d at pp. 282-283). Following oral argument, defendant submitted a citation in support of its contention—*Estate of de Laveaga* (1958) 50 Cal.2d 480, 489. In *Estate of de Leveaga*, a trustee wrongfully withheld predistribution income from a beneficiary, instead treating the income as corpus. (*Ibid.*) The court held that, under these circumstances, the beneficiary was not entitled to both the earnings on the income and interest on it. (*Ibid.*) This holding has no application here, where the "income"—lost profits—was not earning money for plaintiff during the time period for which he sought interest.

Plaintiff's Cross-Appeal

IV

Plaintiff contends the trial court's failure to award any prejudgment interest should be taken into account in scrutinizing the damage award and on any remand. The contention lacks merit.

Preliminarily, defendant claims plaintiff failed to appeal from the trial court's order denying his motion to insert prejudgment interest. While plaintiff's May 13, 1986 notice of appeal does not mention the order, his May 28, 1986 notice of cross-appeal does, so the court may consider his contention.

Defendant also asks that this contention be deemed waived, in that plaintiff failed in his opening brief to provide any authority or analysis in its support. Such a failure ordinarily waives a contention on appeal. (*Balboa Ins. Co.* v. *Aguirre* (1983) 149 Cal.App.3d 1002, 1010; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 496, pp. 484-485.) However, this rule may be relaxed for good reason, especially in view of the fact the court is free to consider points not even raised in the briefs. (*Id.* at p. 485; see *Burns* v. *Ross* (1923) 190 Cal. 269, 275-276.) Thus, we may consider plaintiff's contention.

Although neither section 1983 nor section 1988 of 42 United States Code mandates an award of prejudgment interest, the trial court may, in a section 1983 action, exercise its discretion to award prejudgment interest when necessary to fully compensate the plaintiff. (See *Heritage Homes of Attleboro* v. *Seekonk Water Dist.* (1st Cir. 1981) 648 F.2d 761, 764, vacated on other grounds 454 U.S. 807; *Pressey* v. *City of Houston* (S.D.Tex. 1988) 701 F.Supp. 594, 596, affd. *sub. nom. Pressey* v. *Patterson* (5th Cir. 1990) 898 F.2d 1018, 1026; cf. *Leaf* v. *City of San Mateo* (1984) 150 Cal.App.3d 1184, 1191; *Orme* v. *State of California ex rel. Dept. Water Resources* (1978) 83 Cal.App.3d 178, 186.) However, the trial court may deny prejudgment interest where lost interest was con-

sidered in the damage award, which may be indicated in the size of the award. (See *Landes Const. Co., Inc.* v. *Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365, 1375; *Leaf, supra,* at pp. 1191-1192.)

Here, the record shows the trial court denied without prejudice plaintiff's motion to insert prejudgment interest. He renewed the motion, and it was again denied. The record does not reveal the reason for the denial, whether it was procedural or based on the merits of the motion, whether the trial court had taken lost interest into account in making the damage award, or what factors the trial court considered in denying the motion. Thus it is difficult to tell whether the trial court abused its discretion in denying the motion. In view of the fact it is plaintiff's burden to demonstrate by the record the claimed abuse of discretion, and in the absence of such a demonstration all presumptions and intendments are in favor of the regularity of the trial court's action (*People* v. *Clifton, supra,* 270 Cal.App.2d at p. 862), we conclude plaintiff has failed to demonstrate an abuse of discretion in denying his motion for prejudgment interest and the order denying the motion should be affirmed.

Plaintiff's Appeal

V

Plaintiff asserts the trial court erred in granting defendant Lee Baca qualified official immunity under 42 United States Code section 1983. We disagree.

Preliminarily, defendants contend this appeal should be dismissed, in that plaintiff disregarded key rules of appellate practice. First, plaintiff did not include a statement of facts with citations to the record in his opening brief, as required by the California Rules of Court, rules 13 and 15; instead, plaintiff indicated he would include a statement of the case in his respondent's brief in defendant county's appeal and at one point referred to his trial brief. This failure, defendants claim, hampered their ability to respond to plaintiffs' contentions.

As will be discussed *post*, questions of immunity are questions of law, and they do not require the extensive factual discussion that is required for review of questions of fact. Review of defendants' respondents' brief indicates they were able to effectively address plaintiff's assertions on appeal, and our review of these assertions was not hampered by any failure to fully comply with rules 13 and 15. Therefore, while plaintiff's opening brief may not have complied with the rules governing appellate briefing and is hardly a model brief, we decline to dismiss the appeal due to this failure.

Second, defendants point out plaintiff referred to a supposed error concerning a denial of discovery without citation to the record or any authority, and they claim any contention regarding this error should therefore be deemed waived. Inasmuch as plaintiff actually makes no contention regarding any error but merely brings the discovery issue up in passing in a footnote, we would not have even considered addressing it as a contention on appeal. Of course, as a contention, it would be waived. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 479, pp. 469-471.)

Turning now to the merits of plaintiff's appeal, the trial court ruled, "[w]ith respect to Defendant Baca, . . . because of a lack of proper training in the handling of the kind of situation that confronted him on November 10, 1977, defendant Baca did not fully appreciate or understand that situation, and though handling it improperly, did so in good faith, believing that Nicoletti was entitled to the things that he was demanding on the scene. [¶] This being the case, he should be granted governmental immunity."

Government officials are generally entitled to qualified or "good faith" immunity from civil suits under federal law. (*Harlow* v. *Fitzgerald* (1982) 457 U.S. 800, 806-807.) Good faith has both objective and subjective aspects to it; the objective aspect "involves a presumptive knowl-

edge of and respect for 'basic, unquestioned constitutional rights,' " while the subjective aspect "refers to 'permissible intentions.' " (*Id.* at p. 815.) Thus, good faith immunity will be denied if the official " 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .' " (*Ibid.*, emphasis omitted.) These principles of good faith immunity apply to law enforcement officers sued under section 1983. (*Malley* v. *Briggs* (1986) 475 U.S. 335, 340.)

The objective reasonableness of an officer's action is measured by reference to clearly established law. (*Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 818.) Where the law is clearly established, and no reasonably competent officer would agree the action should be taken, good faith immunity will be denied. (*Malley* v. *Briggs*, *supra*, 475 U.S. at p. 341.) Where officers of reasonable competence could disagree on the issue, immunity will be recognized. (*Ibid.*)

The question whether immunity may be granted is separate from the merits of the plaintiff's case. (*Mitchell* v. *Forsyth* (1985) 472 U.S. 511, 527-528.) It is purely a legal question, thus the appellate court reviewing a trial court's grant of immunity need not examine the merits of the case but need only determine whether, as a matter of law, "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." (*Id.* at p. 528 and fn. 9.)

As previously discussed, the law regarding self-help repossession of a boat pursuant to a preferred ship mortgage under the Ship Mortgage Act was not clearly established. The language of the Act makes no reference to such repossessions, there are cases which hold the parties to a preferred ship mortgage may contract to allow self-

help repossession or other state-law remedies (*Dietrich* v. *Key Bank, N.A.*, *supra*, 693 F.Supp. at pp. 1116, 1117; *Price* v. *Seattle-First Nat. Bank*, *supra*, 582 F.Supp. at pp. 1569-1570), and there are cases which suggest the entire field was preempted by the Ship Mortgage Act and no state-law remedies are available to the mortgagee (*Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle*, *supra*, 637 F.Supp. at p. 307; *Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d at pp. 94-95). Therefore, we cannot conclude Lieutenant Baca violated any clearly established laws regarding self-help repossession under a preferred ship mortgage, and he thus was entitled to good faith immunity on that ground.

VI

Plaintiff additionally asserts the trial court erred in granting defendants immunity under the California Tort Claims Act. Again, we disagree.

The Government Code provides, "[e]xcept as otherwise provided by statute . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (§ 815, subd. (a).)[6] However, "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would [otherwise] have given rise to a cause of action against that employee or his personal representative." (§ 815.2, subd. (a).) If the employee is immune from liability, the public entity likewise is immune. (*Id.*, subd. (b).)

As to an employee, the Government Code provides, "[e]xcept as otherwise provided by statute . . ., a public employee is liable for injury caused by his act or omission to the same extent as a private person." (§ 820,

[6] All further statutory references are to the Government Code.

subd. (a).) However, again "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (§ 820.2.)

Plaintiff claims once sheriff's deputies, including Lieutenant Baca, made their discretionary decision to become involved in the dispute over the ownership of the Magnifico, their actions became purely ministerial and they were no longer immune from liability therefor under section 820.2. They may be liable for conversion of plaintiff's boat, for which there is no immunity, therefore the county also may be held liable under section 815.2, subdivision (a).

Thus, the key question is whether Lieutenant Baca's challenged actions were discretionary or ministerial. If discretionary, there is no liability. If ministerial, liability may attach.

In determining whether an action is discretionary or ministerial, the courts must look beyond a literal definition of "discretionary"; in a sense, most actions involve a certain amount of discretion. (*Johnson* v. *State of California* (1968) 69 Cal.2d 782, 788-790.) The policy behind the provision of immunity for discretionary acts is "the preservation of ardor in the performance of public duties" by protecting public employees "from the spectre of extensive personal tort liability." (*Id.* at pp. 790-791.) Therefore it has been recognized that many of the actions taken by public employees must be beyond the scope of judicial review in order not to chill the decision-making process in other branches of government. (*Id.* at p. 793.) For this reason, discretionary actions have been held to be those involving "basic policy decisions." (*Ibid.*, emphasis omitted.) And, "[a]ccordingly, to be entitled to immunity [the employee must show] that such a policy

decision, consciously balancing risks and advantages, took place." (*Id.* at pp. 794-795, fn. 8.)

Defendants claim Lieutenant Baca's actions fall within the definition of discretionary, relying on *Watts* v. *County of Sacramento* (1982) 136 Cal.App.3d 232. In *Watts*, plaintiffs entered into an agreement to grow and harvest crops on another's land. When they attempted to harvest the crops, the owner ordered them off the property and requested assistance from the county Sheriff's Department in ejecting them. The owner informed the officers he was the owner of the property and plaintiffs had no legal right to be there. The officers instructed plaintiffs to leave the property, under threat of arrest; they obeyed, and the owner converted the crops to his own use. (At p. 234.)

Plaintiffs took the position once the officers "decided" to intervene in the dispute, any subsequent actions taken by them were ministerial. (*Watts* v. *County of Sacramento*, *supra*, 136 Cal.App.3d at p. 235.) The court found "no legal basis" for that position. (*Ibid.*) It noted that in order to settle the dispute between plaintiffs and the owner, "the officers were obliged to exercise their discretion after they had observed what was happening and had listened to the explanation of those present." (*Ibid.*) The court concluded their decision as to what action to take thereafter was an exercise of their judgment and discretion for which they should not be held liable. (*Id.* at pp. 234, 235.)

Plaintiff in the instant case takes a similar position to that taken by plaintiffs in *Watts*. He states his "claim concerns what the County officers on the scene, including defendant Baca, did *after* they made their discretionary decision to become involved in the dispute over ownership of [his] ship. [He] alleges that the officers clearly violated state procedures by taking possession of his ship without a valid court order backing them up, and are

therefore liable for the strict liability tort offense of conversion." (Emphasis in the original.)

As in *Watts*, it could be said that once Lieutenant Baca made the decision to become involved in the dispute between plaintiff and the Nicolettis—as he could hardly fail to do given the potential for a breach of the peace—he was "obliged to exercise [his] discretion after [he] had observed what was happening and had listened to the explanation of those present." (136 Cal.App.3d at p. 235.) He made a policy decision to enforce the terms of the preferred ship mortgage, which appeared valid on its face and appeared to him to give Nicolino Nicoletti the right to repossess the Magnifico over plaintiff's objections rather than to follow the general policy of noninvolvement in ownership disputes. This was a discretionary decision for which he—and thus the county—was immune from liability. (*Johnson* v. *State of California*, *supra*, 69 Cal.2d at p. 793; see Gov. Code, §§ 820.2, 815.2, subd. (b).)

However, it also could be said Lieutenant Baca's actions following his decision to become involved in the dispute were ministerial, in that the basic policy decisions regarding involvement in attempted repossessions had been made by the Sheriff's Department, and his role was only to carry out that policy—to function in an impartial manner, keep the peace and enforce the laws. He did not have to "consciously balanc[e] risks and advantages." (*Johnson* v. *State of California*, *supra*, 69 Cal.2d at pp. 794-795, fn. 8) but merely act in accordance with predetermined policies. Thus his actions were not discretionary, but ministerial, and neither he nor the county was immune from liability. (Gov. Code, §§ 820.2, 815.2, subd. (a).)

Of the two alternatives given above, the former one appears to us to be correct—that Lieutenant Baca's actions were discretionary. When he saw the preferred ship mortgage he read it, interpreted it, and made the

decision to aid its enforcement. He later made the decision to have the Harbor Patrol bring the Magnifico back to the dock when plaintiff attempted to leave the harbor to avoid repossession. At the dock, he made the decision to get plaintiff, his wife and his guard off the Magnifico and take them to the station to discuss the situation. He subsequently made the decision not to allow them back on the boat until after the ownership dispute had been resolved by the courts. In making each of these decisions, Lieutenant Baca had to exercise his discretion in determining the course of action to take; there was no preset course of action which he simply followed. Accordingly, his actions having been discretionary, he—and therefore the county—was entitled to immunity from liability under state law for those actions. Hence, the trial court did not err in granting a nonsuit on plaintiff's state law causes of action.

The judgment and orders are affirmed.

CERTIFIED FOR PUBLICATION

SPENCER, P.J.

We concur:

DEVICH, J.

ORTEGA, J.

APPENDIX B

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: WE C 56172

RICHARD MEILICKE, a/k/a RICHARD COMPTON, *et al.*,
Plaintiffs,

vs.

COUNTY OF LOS ANGELES, *et al.*,
Defendants.

[Filed Feb. 14, 1986]

This case came on regularly for Trial in Department 38 of the above entitled Court, the Honorable Robert C. Nye, Judge Presiding, sitting without a Jury, the Jury having been duly waived. Plaintiffs appeared by their attorneys, Rodney T. Lewin, of Fred, Lewin & Behesnilian, and Robert D. Newman. Defendant appeared by its attorney, Owen Gallagher, County Counsel. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision:

THE COURT ORDERED, ADJUDGED AND DECREED that:

With respect to Defendant Baca, the Court finds that because of a lack of proper training in the handling of the kind of situation that confronted him on November

10, 1977, defendant Baca did not fully appreciate or understand that situation, and though handling it improperly, did so in good faith, believing that Nicoletti was entitled to the things that he was demanding on the scene.

This being the case, he should be granted governmental immunity. Therefore, the Court finds for Defendant Baca and against Plaintiff Richard Compton.

With respect to the defendant County of Los Angeles, the Court finds that while Los Angeles Sheriff's Department trains its officers and has a policy generally with respect to the rights of those involved in mortgage transactions and generally with respect to their conduct when responding to scenes of civil disputes, and generally with respect to how to handle repossessions and disputes arising therefrom, nevertheless, their training with respect to the handling of such disputes arising from enforcement of preferred ships mortgages and with respect to Admiralty Law in such situations was either nonexistent, or so inadequate as to amount to the Los Angeles County Sheriff's Department's having no understandable policy as to such matters.

In a situation such as presented here, where the Sheriff's Officers and Harbor Patrol Officers would have to have such information because of their assignment and duty at Marina del Rey, this lack of policy led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights. The Los Angeles County Sheriff's Department knew, or should have known that such results could occur in the absence of a definite and understandable policy.

Therefore, the Court finds for the Plaintiff Richard Compton, and against The County of Los Angeles.

The Court further finds for Plaintiff Anita Rexroat and against the Defendant County of Los Angeles, and for Defendant Baca and against Plaintiff Anita Rexroat.

On the subject of damages, it is to be borne in mind that this case deals with a unique chattel, the Magnifico II. Not only was it a luxury vessel, but it was equipped as no other known boat, as a recording studio and with accoutrements of other kinds, making it far more valuable than an equally luxurious craft without such equipment.

The Court finds that the Magnifico II, with its equipmen at the time of its taking on November 10, 1977, was of a value of $3,000,000.00.

The Court further finds that the Magnifico II, insofar as its value to the plaintiff and the conduct of his charter business was effectively destroyed before its return to him. Thus, he has lost all the profits from the use of the Magnifico II and its charters from November 10, 1977, to date.

While it is true that upon recovery, plaintiff sold the boat and its business, the Court believes that he never would have done so, and had no intention of doing so, but for the depravation of his boat caused by the incident of November 10, 1977.

In redressing this loss, the Court adopts the testimony of Stephen Keating as set forth in his Model I, and thus awards damages for lost profits from November 10, 1977, through May 29, 1985, in the amount of $2,483,292.00 and continuing on a daily basis until paid, in the amount of $901.36 per day.

The Court accepts the testimony presented by the plaintiff concerning the value of the personal property aboard his boat and lost by the plaintiff, and awards damages therefor in the amount of $516,063.00.

With respect to plaintiff's claim for rental value of the Magnifico II due to its loss to him as a home, since the plaintiff and his wife also had an apartment at Marina Del Rey sometimes used as a home, and since plaintiff is being awarded damages for the value of the vessel as

well as lost profits, the Court feels that an additional award for rental value as claimed would constitute dual recovery, and thus, the claim for rental value is denied.

The Court believes that plaintiff is entitled to recover the next expenses incurred in his attempt to recover the Magnifico II and awards as damages for such the amount of $42,529.00.

The Court further awards the plaintiff $750,000.00 as general damages as compensation for emotional distress and physical and mental suffering.

Plaintiff Richard Compton have and recover from Defendant The County of Los Angeles interest on the above-mentioned sum at the rate of 10% per annum from the date of entry of Judgment, together with costs and disbursements amounting to the sum of $——.

DATED: Feb. 14, 1986.

/s/ Robert C. Nye
HONORABLE ROBERT C. NYE
Judge of the Superior Court

APPENDIX C

Second Appellate District, Division One, No. B020736
S022340

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

RICHARD MEILICKE,

Appellant

v.

COUNTY OF LOS ANGELES,

Appellant

LEE BACA,

Respondent

[Filed Oct. 3, 1991]

Petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed June 23, 1991, which appears at 231 Cal.App.3d 1306. (Cal. Const., Art. VI, Section 14, rule 976, Cal Rules of Court.)

/s/ Lucas
Chief Justice